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No. 04-1377

IN THE

Supreme Court of the United States

DOUGLAS N. PEARSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in view of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker/Fanfan*, 125 S.Ct. 738 (2005), the trial court committed reversible error and violated petitioner's Sixth Amendment constitutional right to have any factual findings relative to sentencing enhancements made under a "beyond a reasonable doubt" standard and that they be made to a jury?

2. Whether the Supreme Court's *Booker/Fanfan* decision constitutes a watershed rule of criminal procedure, so as to require its retroactive application to petitioner?

3. Whether the trial court committed reversible error and violated petitioner's Sixth Amendment constitutional right to have a jury make any factual findings relative to sentencing enhancements under a "beyond a reasonable doubt" standard when it denied petitioner's timely *Apprendi* application at the time of his sentencing?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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OPINIONS AND ORDERS BELOW

The judgment of conviction as to petitioner Douglas N. Pearson was issued at sentencing on December 20, 2002, originally filed on December 23, 2002 in the Southern District of Illinois, and later modified by amended final judgment filed on January 21, 2003 and reprinted in the Appendix ("App.") at 33a-48a.

The decision of the Circuit Court of Appeals for the Seventh Circuit affirming the District Court was entered on August 14, 2003, is published as *United States v. Pearson*, 340 F.3d 459 (7th Cir. 2003), and is reprinted at App. 7a-25a.

The Memorandum and Order of the District Court, dismissing, without prejudice, Pearson's Motion for Post-Conviction Relief Seeking Vacatur of Sentence Or, In the Alternative, A Reduction of Sentence pursuant to 28 U.S.C. § 2255, was entered on August 19, 2004, and is reprinted at App. 29a-32a.

The Memorandum and Order of the District Court, granting Pearson's motion for a certificate of appealability in conjunction with his appeal of the District Court's denial of his 2255 petition, was entered on October 12, 2004, and is reprinted at App. 26a-28a.

The Order of the Seventh Circuit Court of Appeals, vacating the certificate of appealability and affirming the District Court judgment denying Pearson's 2255 petition, was entered on February 8, 2005, and is reprinted at App. 1a-2a.

JURISDICTION

The Order of the Seventh Circuit Court of Appeals, vacating the certificate of appealability and affirming the District Court judgment denying Pearson's 2255 peti-

tion, was entered on February 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . ."

STATEMENT OF CASE

A. Statement of Facts

On December 20, 2002, following his two-count conviction for conspiracy to commit wire fraud and wire fraud, appellant Pearson appeared before the trial judge for sentencing. App. 48a-49a. Pearson's sentence was calculated using the United States Sentencing Guidelines ("USSG"). App. 54a. The court evaluated the sentence based "upon the total amount of aggregate harm or loss pursuant to Guidelines Section 3D1.2(d)." App. 54a. As a result of enhancements made by the court, Pearson's Offense Level was elevated from a base level of 6 to an Offense Level of 26, an increase of 20 levels. App. 54a-55a. The court's sentencing enhancements consisted of: (1) an increase of 12 levels for a finding of loss falling within the range of $1.5 million and $2.5 million; (2) an increase of 2 levels based on the court's finding of "more than minimal planning" on the part of Defendant; (3) an increase of 2 levels based on the "mass market-

ing" and advertising campaign attendant to the conduct; (4) an increase of 2 levels based on Defendant's role as "an organizer, leader, manager or supervisor in [the] conspiracy;" and (5) an increase in 2 levels based on Defendant's "abuse of his position of public and private trust." App. 54a-55a. In total, Pearson's sentence was increased from a statutory maximum of 12 months to 64 months, a total increase of at least 52 months. App. 56a.

The facts that formed the bases for these upward enhancements were made by the court based on a "preponderance of the evidence" standard. App. 52a. They were never decided beyond a reasonable doubt or decided by a jury at all. App. 52a. Pearson's counsel explicitly raised an *Apprendi* objection to the court's enhancement methodology (App. 50a-51a), but the court rejected the objection, stating:

> [W]hile I appreciate the invitation to lead the way in the Seventh Circuit on a different burden of proof in this matter, I'll decline that invitation and let somebody else take the lead on establishing the burden of beyond a reasonable doubt on these matters, let some more wiser and bolder judge take that lead. So far as I can tell the Seventh Circuit is not doing that, and from the case law that I've read, I don't see an inclination at this point to do that, and I think that at this point the burden is still one of a preponderance, and will remain a preponderance in this Court until the Seventh Circuit tells me different. Maybe they'll do that in this case, but they'll have to do that for me.

App. 52a.

B. Proceedings Below

On June 20, 2002, following a four-month jury trial, appellant Pearson was convicted of Conspiracy to Commit Wire Fraud under 18 U.S.C. § 371 (Count I) and Wire Fraud under 18 U.S.C. § 1343 (Count II). At a hearing held on December 20, 2002, Pearson was sentenced by the trial court to a prison term of 64 months, consisting of two separate sentences of 32 months for each count, running consecutively. Pearson was also sentenced to two years of supervised release upon completion of the 64-month sentence and ordered to pay a fine in the amount of $150,000 (allocated as $100,000 for Count I and $50,000 for Count II). App. 56a.

On January 2, 2003, Pearson surrendered to the United States Marshal of the Southern District of Illinois to begin his sentence. Appellant has since served approximately 27 months at a federal correctional facility. App. 37a.

On August 14, 2003, the Court of Appeals for the Seventh Circuit denied Pearson's appeal. App. 7a-25a.

On or about July 13, 2004, based upon the Supreme Court decision in *Blakely v. Washington* and the Seventh Circuit's subsequent ruling in *U.S. v. Booker*, Pearson filed a Motion For Post-Conviction Relief Seeking Vacatur of Sentence Or, In the Alternative, A Reduction Of Sentence pursuant to 28 U.S.C. § 2255. App. 65a. By Memorandum and Order dated August 19, 2004, the trial court dismissed, without prejudice, the habeas corpus petition based upon the Seventh Circuit's ruling that "[t]he Supreme Court has not made the Blakely rule applicable to cases on collateral review. . . ." App. 29a-32a.

On or about October 6, 2004, Pearson filed a motion for a certificate of appealability in conjunction with his

appeal of the trial court's denial of his 2255 petition. App. 67a. By Memorandum and Order dated October 12, 2004, the court granted the motion, finding that "Pearson has made a substantial showing of a denial of a constitutional right." App. 26a-28a. On October 7, 2004, Pearson filed his notice of appeal. App. 67a.

On November 8, 2004, Pearson filed his brief and appendix in support of the appeal of his §2255 petition to vacate, set aside or correct his December 2002 sentence, insofar as the trial court enhanced the sentence based upon factual findings not determined by a jury and not assessed under a "reasonable doubt" standard in violation of the Sixth Amendment. App. 61a. That same day, November 8, 2004, Pearson contemporaneously filed with the Seventh Circuit a motion for bail pending this appeal. App. 61a.

By Order dated November 17, 2004, the Seventh Circuit denied Pearson's application for bail. App. 3a-4a. That same day, by Order also dated November 17, 2004, the Seventh Circuit stayed the proceedings pending the Supreme Court's decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. The Order additionally directed the parties to file statements of position within 14 days after the Supreme Court opinion issued. App. 5a-6a.

On January 12, 2005, the Supreme Court issued its opinion in *United States v. Booker/Fanfan*, 125 S.Ct. 738 (2005). On January 25, 2005, Pearson filed and served his statement of position in accordance with the Seventh Circuit's directive. App. 62a.

On or about January 28, 2005, following the Seventh Circuit's deadline to file statements of position, the Government filed a motion for an extension of time to file its position statement. App. 62a.

By Order dated February 8, 2005, the Seventh Circuit, in light of its opinion in *McReynolds v. United States*, 2005 WL 237642 (7th Cir. February 2, 2005), vacated Pearson's certificate of appealability and affirmed the district court judgment denying Pearson's 2255 petition. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. The *Booker/Fanfan* Decision Must Be Applied Retroactively in This Case, As Pearson Raised a Timely *Apprendi* Objection at His Sentencing

The Supreme Court does not explicitly address the issue of retroactive application of its *United States v. Booker/Fanfan* decision,[1] stating only:

> [W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)('[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule

[1] Neither the *Booker* or *Fanfan* appeals, as here, were the consequence of federal *habeas corpus* petitions or based on other forms of collateral review, so it is not altogether unexpected that the Court did not address an issue not before it. "[T]he Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases." *United States v. Johnson*, 457 U.S. 537, 542 (1982). Indeed, given that Justice Ginsburg is the only member of the Court to comprise the majority in both the "Sixth Amendment" and "remedial" opinions authored by Justices Stevens and Breyer, respectively, there is no absolutely reliable means of discerning how the Court would apply the *Booker/Fanfan* holding to a federal *habeas* appeal.

> constitutes a 'clear break' with the past').[2] . . . Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, ***whether the issue was raised below*** . . . .

Slip Opinion, at 12 (Breyer, J.)(emphasis added). Yet the very fact that defendant Pearson raised a timely *Apprendi* challenge at sentencing and the holding of *Griffith*, as well as decisions cited therein, suggest that retroactive application of *Booker/Fanfan* is appropriate in Pearson's case.

As a preliminary point, it cannot be overstated that defendant Pearson stands apart from other *habeas* petitioners—as well as other defendants whose appeals are not yet final—insofar as it is undisputed that he raised a timely, albeit unsuccessful, *Apprendi* argument during his sentencing. At his December 20, 2002 sentencing, Pearson explicitly urged the trial court to adopt, in accordance with *Apprendi*, a "reasonable doubt" burden of proof with respect to any sentencing enhancements. App. 50a-51a. Instead the trial court rejected the appli-

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[2] The "clear break" phraseology refers to the *Griffith* Court's adherence to the "clear break" exception, whereby a new rule that constituted "an explicit and substantial break with prior precedent" could not be instituted retroactively. 479 U.S. at 714-15. In the *Griffith* case, the Court cited the example of its ruling in *Allen v. Hardy*, 478 U.S. 255 (1986), that *Batson v. Kentucky*, 476 U.S. 79 (1986), was not to be retroactively applied on federal *habeas* review because *Batson*, which established that the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire was unconstitutional, explicitly overruled *Swain v. Alabama*, 380 U.S. 202 (1965). Here, in *Booker/Fanfan*, there is no such issue of overruling precedent as the Court deems its opinion a "culminati[on]" and "reaffirm[ance]" of *Apprendi*. *See* Slip Opinion, at 12, 20 (Stevens, J.)

cation, suggested the Seventh Circuit "is not doing that" and invited a "more wiser and bolder judge [to] take that lead." App. 52a. This Court, the final authority on this issue, has now ruled that the argument advanced by Pearson and rejected by the trial court was, in fact, mandated by the Sixth Amendment. As Justice Breyer writes above, the fact that Pearson raised a timely challenge to the sentencing judge's "preponderance of the evidence" standard deserves special consideration when assessing whether retroactivity is appropriate.

As *Griffith* and the cases cited therein also make clear, the Court's overriding concern in assessing whether retroactivity of a constitutional law is proper is to guarantee that similarly situated defendants are treated equally. Here, sustaining Pearson's present sentence would not only continue to put him on different footing from like former Exide officers who were convicted and sentenced in this matter, but from other, totally unrelated defendants convicted in the Seventh Circuit *at the precise time* of Pearson's conviction. In *Griffith*, the Court recognized, albeit in the context of direct review, that

> it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'

479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971); citing *United States v. Johnson*, 457 U.S. 537, 546-47 (1982)). The *Griffith* Court further condemned the patent inequity of a "one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoy[ing] retroactive application, while others similarly situated have their claims adjudicated under the old doc-

trine." 479 U.S. at 327 (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977)(Powell, J., concurring)). And yet that is precisely what would occur if Pearson is merely lumped with all other federal *habeas* litigants, the vast majority of whom did not assert timely *Apprendi* objections.

In his original appeal to the Seventh Circuit in 2003, Pearson unsuccessfully argued that the trial court exercised disparate sentencing in sentencing two other equally, if not arguably more, culpable participants in the underlying Exide wire fraud case—namely, former Executive Vice President Joseph Calio and former Chief Financial Officer Alan Gaulthier—to just six months home arrest and five months imprisonment followed by five months home confinement, respectively, pursuant to plea agreements, as contrasted with Pearson's sentence of 64 months following a three-month trial.[3] Importantly, in the totally unrelated matter of *United States v. Shearer*, 379 F.3d 453 (7th Cir. 2004), the Seventh Circuit, based on its *Booker* decision (now affirmed by this Court), vacated and remanded the sentence of a defendant who was convicted ***on the very same day*** (June 20, 2002) as Pearson. 379 F.3d at 454. Surely this Court did not intend that two defendants, convicted on the very

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[3] Indeed, as noted in Pearson's original appeal, at Pearson's sentencing, the trial court, in assessing Calio's credibility, commented: "The key to Mr. Pearson's role in this case obviously does boil down in large part to Mr. Calio, unfortunately. And if I put the two side-by-side, I more often than not would probably believe Mr. Pearson, if I ever had a conversation with him. I don't know that I ever have had. But a lot of what Mr. Calio said I probably would choose not to believe." *See* Pearson Sentencing Transcript dated December 20, 2002, at App. 53a. Notwithstanding, the court acknowledged accepting Calio's account of a critically disputed oral exchange between he and Pearson using a "by a preponderance of the evidence" standard. *Id.*

same day, should receive disparate sentencing treatment based on the fact that one defendant (Pearson)—who raised a timely *Apprendi* challenge no less—had a more accelerated appeal than the other (Shearer).[4] As the Supreme Court declared in *United States v. Johnson*:

> This Court has no power to speed up or slow down the appellate process in the many tribunals throughout the country to ensure similar treatment of similarly situated defendants. The Court does, however, have the power to eliminate the obvious unfairness that results when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule.

457 U.S. at 556 n.17. As the *Johnson* majority additionally voiced: "The dissent argues that 'we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law.' . . . until now this Court has not 'resolved' this problem so much as it has chosen to tolerate it. The time for toleration has come to an end." *Id.* at n.16.

In the *Hankerson* decision, which analogously found that a new rule of constitutional law requiring that all elements of a criminal offense be established beyond a reasonable doubt and invalidating presumptions that shifted the proving of such elements to the defendant *should be given retroactive application*, the Supreme Court stated:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function . . . , the new rule has been given complete retroac-

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[4] The Seventh Circuit's opinion does not indicate whether Shearer raised an *Apprendi* objection at sentencing.

> tive effect.[5] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' . . .
>
> '[*In re*] *Winship*[, 407 U.S. 203 (1970)] expressly held that **the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error**. The standard provides concrete substance for the presumption of innocence that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . . To this end, **the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue**. . . .
>
> 'Plainly, then, **the major purpose of the constitutional standard of proof beyond a reasonable doubt** announced in *Winship* **was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect**.'

432 U.S. at 241 (citations omitted)(emphasis added). Such a "bedrock 'axiomatic and elementary' principle" as the reasonable-doubt standard is precisely the type of "watershed rules of criminal procedure" that the

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[5] *See also Allen v. Hardy*, 478 U.S. 255, 259 (1986)(retroactivity appropriate where decision announcing new standard "goes to the heart of the truthfinding function" and "is designed to enhance the accuracy of criminal trials"); *United States v. Johnson*, 457 U.S. 537, 544 (1982)("the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function' . . .").

Supreme Court has designated as warranting retroactivity for *habeas* petitioners. *See Teague v. Lane*, 489 U.S. 288, 311, 312 (1989). As the *Hankerson* decision unequivocally found: failure to properly apply the reasonable-doubt standard "substantially impairs the truth-finding function," which, in turn, triggers retroactive application of a new, responsive constitutional doctrine.

The Seventh Circuit in *United States v. Pree*, 2004 U.S. App. LEXIS 19252, *48 (7th Cir. Sept. 14, 2004), acknowledges protecting the constitutional rights of appellants who ***never*** asserted an *Apprendi/Blakely* challenge:

> [Defendant] does not address to this court, nor can we find evidence in the record to indicate, that she addressed before the district court the constitutionality of her sentencing enhancement. In light of the sea change in federal sentencing law wrought by *Blakely* and *Booker*, we think it appropriate to take note of the possibility of an unconstitutional sentencing enhancement. *See United States v. Seacott*, 15 F.3d 1380, 1383 (7th Cir. 1994). Given the precedent in this circuit prior to *Blakely*, we think it would be unfair to characterize [defendant] as having waived a challenge to the validity of her sentencing enhancement.[6]

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[6] *See also United States v. Messino*, 382 F.3d 704, 714-15 (7th Cir. 2004)(Easterbrook, Circuit Judge, dissenting in part):

> [T]he United States contended that the defendants had not adequately preserved an argument based on *Blakely v. Washington*, — U.S. —, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and that our review therefore is limited to a search for plain error. All three members of the panel disagree with that position. Both [defendants] advanced in their opening briefs arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which led to *Blakely* and *Booker*. True,

What message would it send and what goal would be achieved, in relation to the Supreme Court's overriding concern that similarly situated defendants be sentenced equally, if Pearson, who raised a timely *Apprendi* objection, is denied the same constitutional protection that was accorded to other defendants who did not raise an *Apprendi/Blakely* objection?

The *Booker/Fanfan* decision confirms that Pearson, as a defendant whose sentence was substantially enhanced by factual findings not determined beyond a reasonable doubt or by a jury, was deprived certain fundamental Sixth Amendment rights. The record is clear that Pearson asserted, and was improperly denied, such constitutional rights under *Apprendi* at the time of his sentencing—and is presently serving an *additional* 4-plus years as a result. The Supreme Court's mandate is equally unmistakable that when a defendant is denied a constitutionally prescribed reasonable-doubt burden of proof, so as to impair the trial's fact-finding function, any new, consequent constitutional principle is deemed a "watershed rule" requiring retroactive effect.

II. The Supreme Court Has Concluded That the Federal Sentencing Guidelines, As Mandatorily Applied to Pearson, Are a Violation of the Sixth Amendment

Pearson appears before this Court because, as a result of sentencing enhancements predicated on a judge's fact-finding under a "preponderance of the evidence" standard, his two-count conviction for conspiracy to commit wire fraud and wire fraud was elevated from a base 6 offense level to a 26 offense level, and his sentence was

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appellants did not develop these arguments at length in either the district court or their appellate briefs, but the law was so firmly against them that elaboration would have been pointless.

consequently increased from a statutory maximum of 12 months to 64 months.

In its historic decision in *United States v. Booker/Fanfan*, 543 U.S. ___, 125 S.Ct. 738 (2005), the Supreme Court, in view of its prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), came to the inescapable conclusion that the Federal Sentencing Guidelines, if applied mandatorily, violate the Sixth Amendment insofar as "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S.Ct. at 756; *see also id.*, at 795 (Thomas, J., dissenting in part)("The Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant"). Hence, by virtue of Pearson's sentencing judge making significant factual findings under a preponderance-of-the-evidence standard that resulted in extending his sentence an additional 4-plus years in violation of the Sixth Amendment, Pearson has remained incarcerated through unconstitutional means for more than one year.

In articulating its rationale for deeming the Federal Sentencing Guidelines unconstitutional, at least as applied mandatorily as in Pearson's case, this Court recounted its recent holdings in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely*, Sixth Amendment analysis that bears summarizing, in part, here. In *Jones*, the Court originally established a " 'rule requiring jury determination of facts that raise a sentencing ceiling' in state

and federal sentencing guideline systems." 125 S.Ct. at 748 (quoting *Jones*, 526 U.S. at 251 n.11). The following year in *Apprendi*, the Court expounded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 125 S.Ct. at 748 (quoting *Apprendi*, 530 U.S. at 490). Thereafter, in *Ring*, the Court even more simply stated that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 125 S.Ct. at 749 (quoting *Ring*, 536 U.S. at 602). The *Ring* Court further espoused that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." 125 S.Ct. at 749 (quoting *Ring*, 536 U.S. at 605). Finally, last year in *Blakely*, the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 125 S.Ct. at 749 (quoting *Blakely*, 124 S.Ct. at 2537)(emphasis in original).

In discussing the evolutionary process by which sentencing enhancements became exponentially greater while the jury's role in this "new sentencing regime" became correspondingly smaller, the *Booker/Fanfan* Court concluded that

> [I]t is the new circumstances, not a tradition or practice that the new circumstances have superceded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment for-

> malism, but by the need to preserve Sixth Amendment substance.

125 S.Ct. at 752. The Court reiterated that this fundamental constitutional protection is steeped in centuries-old common law:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law.

Id. at 753 (citing *Jones*, 526 U.S. at 244-48). Hence, given the Court's characterization of its *Booker/Fanfan* holding as arising from "new circumstances, not a tradition or practice that the new circumstances have superceded" and as vindicating "principles . . . not the product of recent innovations in our jurisprudence," there can be no doubt that this decision constitutes one of the "small set of 'watershed rules of criminal procedure' " which "improve[s] the pre-existing fact-finding procedures" and therefore mandates retroactive application under *Teague v. Lane*, 489 U.S. 288, 311, 312 (1989).

III. Because *Blakely* and *Booker/Fanfan* Establish a Watershed Rule of Criminal Procedure, Its Holding Must Be Applied Retroactively to Petitioner Pearson

Pearson submits that by virtue of the fact that *Blakely*, and by extension *Booker/Fanfan*,[7] created a "new rule"

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[7] "*Blakely* reserved decision about the status of the federal Sentencing Guidelines, . . . so *Booker* itself represents the establishment of a new rule about the federal system." *McReynolds*, 397 F.3d at 481.

of criminal procedure that undermined the fundamental fairness of his sentence, it must be applied retroactively to his sentence. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[8] *Teague*, 489 U.S. at 300. Indeed, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of 'administration of justice with an even hand.' " *Id.* at 315 (citations omitted). Under *Teague*, a new rule shall be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' ", or "if it requires the observance of 'those procedures that are 'implicit in the concept of ordered liberty'." *Id.* at 307, 310 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 693 (1971)(Harlan, J., concurring in part, dissenting in part)).

Because retroactively applying constitutional rules not in existence at the time of a conviction "undermines the principle of finality which is essential to the operation of our criminal justice system",[9] *Teague*, 489 U.S. at 309,

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[8] The *Teague* Court deemed its new standards superior to that of the retroactivity standard established in *Linkletter v. Walker*, 381 U.S. 618 (1965), which led to "unfortunate disparity in the treatment of similarly situated defendants on collateral review." 489 U.S. at 305.

[9] Notwithstanding, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows . . . that 'conventional notions of finality' should not have as much place in criminal as in civil litigation.' " *Teague*, 489 U.S. at 309 (citation omitted)(emphasis in original); *see also id.* at 328 (Brennan, J., dissenting)("conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review")(quoting *Fay v. Noia*, 372 U.S. 391, 424 (1963)).

retroactivity has historically been applied to "only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523 (2004)(citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)(quoting *Teague*, 489 U.S. at 311)). Such "watershed rules of criminal procedure" emerge as a consequence of

> time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.

Teague, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J.))(emphasis in original). From this, Justice Harlan concluded that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Teague*, 489 U.S. at 312 (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969)(Harlan, J., dissenting).

Be it a "sea change"[10] or a "new constitutional rule", *Blakely* established that the "right [of a jury to make

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[10] As the Ninth Circuit stated in *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), *Blakely* and its progeny has "worked a sea change in the body of sentencing law." *See also United States v. Pree*, 2004 U.S. App. LEXIS 19252, *48 (7th Cir. Sept. 14, 2004)("In light of the sea change in federal sentencing law wrought by *Blakely* and *Booker* . . ."); *United States v. Reyes-Acosta*, 2004 U.S. Dist. LEXIS 17635 (N.D. Ill. Sept. 2, 2004), *6 ("*Blakely* will override the legislature's preference that defendants be sentenced by judges and, at least, partially restore the jury's role in sentencing. The use of the jury in this way would represent a sea change in the federal criminal jurisprudence").

findings of fact relative to the imposition of a penalty] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 124 S.Ct. at 2539. Such a radical departure from pre-existing fact-finding procedures—and speaking to a core, fundamental right—must be considered a *watershed rule*. True, in *Schriro*, *supra*, Justice Scalia, writing for a 5-4 majority, declined to find that the holding in *Ring v. Arizona*, 536 U.S. 584 (2002)—which found that a sentencing judge may not determine an aggravating factor necessary for the imposition of the death penalty—announced a watershed rule that necessitated retroactive application, since "reasonable minds continue to disagree over whether juries are better factfinders *at all*" and hence precluded the conclusion that "judicial factfinding *seriously* diminishes accuracy" as to produce an "impermissibly large risk of injustice." 124 S.Ct. at 2525 (citations omitted)(emphasis in original). Yet those opinions are at odds with the holding of *Blakely*, wherein Justice Scalia, again writing for a 5-4 majority, observed that "[o]ur Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a judge" (124 S.Ct. at 2543) and admonished that sentencing should not be dictated "on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Id.* at 2542. *See also id.* at 2540 ("the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust [judges' intuitive sense of how far is *too far*]")(emphasis in original); *Ring*, 536 U.S. at 610 (Scalia, ~~J.,~~ concurring)("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the

statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt").

Similarly, the Seventh Circuit erred when it capriciously held that *Schriro* "is all but conclusive" on the issue of retroactive application of *Booker*.[11] *See McReynolds v. United States*, 397 F.3d 479, 480 (7th Cir. 2005). Indeed, though acknowledging that *Booker/Fanfan* announced a new rule of criminal procedure, the Seventh Circuit makes the incredible claim that

> *Booker* does not in the end move any decision from judge to jury or change the burden of persuasion. . . . As a practical matter then, petitioners' sentences would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system.

397 F.3d at 481. The *McReynolds* court tellingly does not cite to a single passage of the *Booker/Fanfan* opinion to substantiate the above conclusion, which, parenthetically, is contradicted by Justice Breyer's assessment in the Court's "remedial" opinion that its decision con-

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[11] Other courts have correctly recognized that *Schriro* is not dispositive insofar as

> Schriro addressed only the allocation of factfinding responsibility between the judge and jury. There is a second component to Blakely/Booker that Schriro did not address, namely, that facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence.

United States v. Siegelbaum, 2005 WL 196526, *3 (D.Or. January 26, 2005); *see also Rucker v. United States*, 2005 WL 331336, *8 (D.Utah February 10, 2005)(quoting *Siegelbaum*). As the *Rucker* court noted, "*Schriro* did not address this issue because the Arizona statute already required proof beyond a reasonable doubt." *Id.* (quoting *Ring*, 536 U.S. at 597).

stitutes "a constitutional requirement that creates fundamental change." 125 S.Ct. at 758; *see id.*, at 756, 757 (wherein majority refers repeatedly to its "constitutional holding"). Moreover, the *McReynolds* opinion does not indicate whether the defendant in that case, as here, raised a timely *Apprendi* objection at sentencing.[12] Again, Pearson submits that this critical fact distinguishes his appeal from the legions of other *Booker/Fanfan*-based appeals.

The *McReynolds* court also rationalizes its decision by noting that in *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), it previously held that *Apprendi* did not apply retroactively, and consequently, this "is equally true of *Booker*." 397 F.3d at 480-81. Interestingly, however, in *Curtis*—decided June 19, 2002, ***the day before*** petitioner Pearson was convicted—the Seventh Circuit recognized that the trial court erred in enhancing the defendant's sentence by making factual finding as to the quantity of distributed drugs since "*Apprendi* establishes that this decision was made by the wrong body (the court) and under the wrong burden of persuasion (a preponderance of the evidence)." 294 F.3d at 842. The *Curtis* court further found that "*Apprendi* . . . identifies a new rule of criminal procedure." *Id.* at 843. Nevertheless, at the time of Pearson's sentencing, some six months after the *Curtis* decision, the trial judge, in rejecting Pearson's application that a "reasonable doubt" burden of proof be applied to any sentencing enhancements, still suggested the Seventh Circuit "is not doing that" and invited a

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[12] Similarly, the only two other Circuit Court decisions to decide *Booker/Fanfan*'s retroactive application to initial § 2255 petitions—*Humphress v. United States*, 2005 WL 433191 (6th Cir. February 25, 2005) and *United States v. Price*, 2005 WL 535361 (10th Cir. March 8, 2005)—also make no reference as to whether the defendants raised timely *Apprendi* objections at time of sentencing.

"more wiser and bolder judge [to] take that lead." App. 52a.

During last year's Supreme Court oral argument in *Booker/Fanfan*, Justice Stevens certainly allowed for the possibility that the Court's ultimate decision would allow for retroactive application, stating:

> I had been under the impression, perhaps erroneous, that in fact the number of unconstitutional departures if one follows Apprendi as being the constitutional rule, is actually a small percentage of the total, and if it should follow that only three, four, five, six percent of the sentences ***that have heretofore been imposed*** or will be imposed in the future ***would be unconstitutional***, that's a pretty weak reason for saying the whole [federal sentencing guidelines] is unconstitutional on its face, or even in one provision of the statute. It seems to me you just say, 'Oh, okay, you can't impose those sentences in those three percent of the cases.' I don't know why that's a departure from our prior practice.

App. 71a-72a (emphasis added). Likewise, Justice Scalia, who authored the *Blakely* opinion, also did not reject the possibility of *Blakely* applying retroactively during the *Booker/Fanfan* oral argument:

> SOLICITOR GENERAL PAUL CLEMENT: . . . But I think any way you slice this, [the *Blakely* decision] is going to have a tremendous impact on the reality of criminal sentencing in the Federal system.
>
> JUSTICE SCALIA: Well, as to the past. I mean, it may have a significant one-shot impact with respect to cases that were decided without Blakely in mind. But for the future, I, I just don't know agree with you that changes could make some reduction. . . .

App. 70a-71a.

Furthermore, in *Simpson v. United States*, the Seventh Circuit observed that *Blakely* did not expressly foreclose retroactive application. 376 F.3d 679, 682 (7th Cir. 2004)("[s]hould the Supreme Court announce that *Blakely* applies retroactively to cases on collateral review . . . ."); *see also United States v. Reyes-Acosta*, 2004 U.S. Dist. LEXIS 17635, *9 (N.D. Ill. Sept. 2, 2004)(finding that "the Blakely rules may be retroactively applied" where defendant has pled guilty but not been sentenced); *Shell v. United States*, 2004 WL 1899013, *6 (N.D. Ill. August 16, 2004) ("*Simpson* not[ed] that the Supreme Court has yet to decide whether or not *Blakely* applies to habeas petitions"). Other federal courts have also demonstrated a willingness to entertain *Booker/Fanfan* and *Blakely* applications on a retroactive basis. *See, e.g., United States v. Siegelbaum*, 2005 WL 196526, *4 (D.Or. January 26, 2005)(suggesting that initial § 2255 petitions are entitled to *Blakely/Booker* retroactive application relative to a defendant "serving a sentence enhanced on the basis of ***contested facts*** that were not found to be true [by a jury] beyond a reasonable doubt, nor admitted by the defendant")(emphasis in original); *Morales v. United States*, 2004 WL 1701037, *2 (D.Minn. July 30, 2004)(in setting briefing schedule, court held that"[b]ased upon the Supreme Court's recent ruling in *Blakely v. Washington*, . . . and the Eighth Circuit's interpretation of *Blakely* as rendering the Guidelines unconstitutional, . . . the issues of the potential retroactivity and impact of these opinions on Petitioner's particular circumstances warrant further exploration"). Additionally, in *United States v. Burton*, 2004 WL 1813105, *6 (E.D. Pa. July 21, 2004), the trial court concluded that "[t]he Supreme Court has not ruled whether *Apprendi* (and *Blakely* on which it was based) applies retroactively; thus this is an open ques-

tion as well." The *Burton* court, having "assume[d] *arguendo* that *Blakely* applies to the Federal Sentencing Guidelines and applies retroactively in habeas corpus proceedings", proceeded to reconsider the defendant's sentencing under an *Apprendi/Blakely* analysis.[13] *Id.* at *7-8.

Notwithstanding the *Schriro* Court's reluctance to retroactively apply the *Ring* holding, *Booker/Fanfan's* and *Blakely*'s strides to end indeterminate sentencing is distinguishable from *Ring*'s concern in protecting defendants from the imposition of capital sentences by arbitrary means. In *Blakely*, by way of example, Justice Scalia observed:

> Of course indeterminate schemes involve judicial factfinding in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

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[13] In *Burton*, the court reaffirmed the sentence in view of Blakely because the petitioner's guideline range was "based solely on facts admitted to by defendant" at his plea hearing. Here, Pearson has not entered a guilty plea, nor stipulated to facts in conjunction therewith, which would, perforce, validate his sentence.

124 S.Ct. at 2540 (emphasis in original). *See also Blakely*, 124 S.Ct. at 2549 (O'Connor, J., dissenting)(notwithstanding "the fact that we hold in *Schriro v. Summerlin* that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack")(internal citations omitted). Hence, in *Ring*, the defendant understands the risk that the commission of murder could result in statutory imposition of the death penalty.[14] In the case of appellant Pearson, however, where sentencing is determined on such subjective matters as "relevant conduct", "role in the offense" and the "amount of loss" attributable to him, his fate is left totally to the discretion of the sentencing judge as to what wide-ranging actions qualify as such characterizations.[15]

To even suggest that the *Blakely* decision (and by extension, *Booker/Fanfan*), which prompted the Seventh Circuit and other Circuit Courts to essentially render the Guidelines unconstitutional, is not a watershed rule of criminal procedure is disingenuous and ignores a colossal change in American jurisprudence. The Circuit courts' widespread post-*Blakely* practice of vacating sentences rendered under the Guidelines and remanding defendants for re-sentencing bears witness to this. Such

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[14] In *Ring*, Arizona's first-degree murder statute prescribed that the offense "is punishable by death or life imprisonment as provided by § 13-703." 536 U.S. at 592.

[15] The concept of "relevant conduct" compounds the fatal constitutional deficiencies of the Guidelines even further. As the court pointed out in *United States v. Shonubi*, 103 F.3d 1085, 1095 (2d Cir. 1997), "evidence tending to prove 'relevant conduct' is not merely taken into consideration at sentencing, it *determines* sentencing (subject only to departure authority)". (emphasis in original).

a fundamental change in the process—and establishment of a constitutional right—by which fact-finding can only be conducted by a jury at the sentencing stage for *any* form of punishment is very clearly a procedure, as contemplated by Justice Harlan and adopted in *Teague*, "implicit in the concept of ordered liberty." As such, fundamental fairness and evenhanded justice requires that this new rule be applied retroactively to petitioner Pearson.

CONCLUSION

Based on the foregoing arguments, the granting of *certiorari* is warranted and the decision of the Seventh Circuit should be reversed insofar as the its decision in *McReynolds v. United States*, 397 F.3d 479, 480 (7th Cir. 2005), is inconsistent with *Booker/Fan* and this Court's earlier precedent.

Respectfully submitted,

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Dated: April 4, 2005

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 04-3650
Submitted February 3, 2005
Decided February 8, 2005

DOUGLAS N. PEARSON,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois
No. 04 C 487
David R. Herndon, *Judge*.

Before

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

ORDER

In light of this court's opinion in *McReynolds v. United States*, 2005 WL 237642 (7th Cir. Feb. 2, 2005), we VACATE the certificate of appealability and AFFIRM the district court judgment denying Pearson's motion to vacate, 28 U.S.C. § 2255.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 04-3650
November 17, 2004

DOUGLAS N. PEARSON,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois
No. 04 C 487
David R. Herndon, *Judge.*

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Upon consideration of the MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DOUGLAS N. PEARSON'S MOTION FOR BAIL PENDING APPEAL OF DENIAL OF HIS 2255 PETITION, filed on November 8, 2004,

IT IS ORDERED that the motion is DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 04-3650
November 17, 2004

DOUGLAS N. PEARSON,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

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Appeal from the United States District Court
for the Southern District of Illinois
No. 04 C 487
David R. Herndon, *Judge.*

Before

Hon. DIANE P. WOOD, *Circuit Judge*

ORDER

IT IS ORDERED that the proceedings in this case are STAYED pending the Supreme Court decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. The parties shall filed statements of position within 14 days after the Supreme Court opinion isues.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 02-4356, 03-1005, 03-1232

UNITED STATES OF AMERICA,

Petitioner-Appellee,

—v.—

DOUGLAS N. PEARSON and ARTHUR M. HAWKINS,

Defendants-Appellants.

Argued May 27, 2003
Decided Aug. 14, 2003
Rehearing and Rehearing En Banc
Denied Oct. 14, 2003*

Miriam F. Miquelon (argued), Office of the United States Attorney Criminal Division, Fairview Heights, IL, for Plaintiff-Appellee.

Harold J. Ruvoldt (argued), Edwards & Angell, New York, NY, for Defendant-Appellant, Douglas N. Pearson.

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* Chief Judge Joel M. Flaum and Judge Kenneth F. Ripple took no part in the consideration of this case.

Oscar Stilley (argued), Fort Smith, AR, for Defendant-Appellant, Arthur M. Hawkins.

Before Rovner, Diane P. Wood, and Williams, Circuit Judges.

WILLIAMS, Circuit Judge.

Arthur Hawkins and Douglas Pearson were convicted of wire fraud and conspiracy to commit wire fraud based on their participation in a bribery scheme that facilitated the distribution of their company's defective batteries. Hawkins and Pearson appeal their convictions, arguing, among other things, that they should not have been tried on a superceding indictment that was filed outside the relevant statute of limitations, their case should not have been tried in the Southern District of Illinois, they were prejudiced by certain discovery rulings of the district court, and the district court improperly limited their ability to examine a key witness at trial. We reject all of their arguments and affirm the judgment of the district court in all respects.

I. BACKGROUND

Arthur Hawkins and Douglas Pearson were officers of Exide Corporation, a battery manufacturer. Hawkins was the CEO and Chair of the Board of Directors, while Pearson served as Executive Vice President of Sales and Marketing and later as President of North American Operations. In 1993, Exide bid on a contract to manufacture DieHard batteries for Sears. Exide's bid con-

tained a promise of "space age technology," and it stated that Exide's DieHard batteries would contain silvium II (silver additive), high utilization paste, and one-inch breed lugs. In April 1994, Exide was awarded the DieHard contract.

Despite Exide's promises, the batteries it manufactured contained only trace amounts of silver, the high utilization paste did not add any value to the battery, and the one-inch lug created a design flaw. As early as October 1994, soon after the batteries were rolled out in Sears stores, Exide officials were warned of significant quality problems with the batteries. As a result, Sears indicated to Exide that it was in jeopardy of losing the DieHard business. By the end of October, Exide went into approximately 700 stores nationwide to remove defective batteries from the shelves.

In order to keep the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. Beginning in March 1995 and continuing through February 1996, Exide made several payments of approximately $10,000 each to Marks. At first, Joseph Calio, Senior Vice President of Sales and Marketing for Exide, gave the bribes to Marks. After Calio complained about making the payments, Exide sent the bribes to Marks's phony consulting company, DG Consulting, by check or wire. Marks left Sears in July 1997.

In April 1998, Hawkins informed Marks that Calio had implicated Marks in an investigation by the Florida Attorney General's Office into the Exide bribery scheme. In order to cover up their arrangement, Hawkins and Marks concocted a phony consulting agreement between Exide and DG Consulting and created supporting backdated documents to substantiate the bribe payments. Hawkins paid Marks $15,000 in spring of 1999 and an additional $10,000 later that fall for

Marks's participation in the cover-up scheme and for his execution of the false cover-up documents.

In January 2001, Hawkins and Pearson were charged in a two-count indictment with wire fraud and conspiracy to commit wire fraud. The indictment, which was filed under seal, charged that the batteries failed testing standards and that Exide falsified internal quality assurance reports to hide latent manufacturing defects. It also charged that Exide supplied the defective batteries to Sears distribution centers, causing defective batteries to be distributed nationwide to consumers, and defendants failed to recall batteries that were known to be defective. In addition, there were allegations that Exide falsely advertised that the batteries were manufactured with certain "proprietary features" when the batteries either did not contain the features or they added nothing to the durability or quality of the batteries. Finally, according to the indictment, after the defective batteries were in the stores, defendants made unlawful payments to Marks in an attempt to influence his independent judgment and to promote the business arrangement with Sears, and then concealed the unlawful payments by causing corporate financial records to be falsified.[1]

After the original indictment was returned against Hawkins and Pearson in January 2001, two superceding indictments were filed in open court in March 2001, then in July 2001. Hawkins and Pearson were tried on the second superceding indictment beginning on March 18, 2002. Following approximately three months of trial, a

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[1] In March 2001, Marks and Calio pled guilty to wire fraud and signed plea agreements with the government. In December 2001, Sears Automotive Marketing Services, Inc., a subsidiary of Sears, entered into a pretrial diversion agreement in which the U.S. Attorney's Office agreed not to prosecute it in exchange for a payment of $62.6 million.

jury convicted Hawkins and Pearson on both counts. Hawkins was sentenced to 120 months' imprisonment, a three-year term of supervised release, and a fine of $1 million, while Pearson received a sentence of 64 months' imprisonment, a two-year term of supervised release, and a fine of $150,000. Defendants appeal.

II. ANALYSIS

Hawkins and Pearson have taken a kitchen-sink approach to their appeal, filing separate briefs (with voluminous appendices) and together raising over a dozen distinct issues, each with their own sub-contentions. Neither challenges the sufficiency of the evidence to support their conviction. In the face of the avalanche of issues they have raised, we will focus here on defendants' most substantive contentions.

A. Superceding Indictment

Defendants first argue they were tried under a second superceding indictment that, because it was returned outside the statute of limitations period and did not relate back to the original indictment, was time-barred. We review the district court's ruling regarding the statute of limitations de novo. *United States v. Anderson,* 188 F.3d 886, 888 (7th Cir.1999). The original indictment against defendants, which included a wire-fraud count for the wiring of money on January 31, 1996, was filed January 19, 2001, within the five-year statute of limitations. *See* 18 U.S.C. § 3282. Subsequently, a first superceding indictment was returned on March 22, 2001, and a second superceding indictment was returned July 19, 2001. Although only the original indictment was filed within the five-year limit, "a superceding indictment that supplants a still-pending original indictment relates back to

the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir.1996). Defendants have two statute of limitations complaints about the indictments: the original indictment was filed under seal and the later indictments do not relate back to the original indictment.

We first address defendants' concern that the original indictment was sealed. Defendants argue that despite the fact that filing an indictment within the statute of limitations period tolls the running of the statute of limitations, it should not have been tolled in this case because the original indictment was filed under seal. Federal Rule of Criminal Procedure 6(e)(4) provides that a court "may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial." Rule 6 does not require the statute of limitations analysis to be altered when an indictment is sealed, and we see no reason why, in a case such as this where an open indictment was filed only two months later, the statute of limitations should continue to run after a sealed indictment has been returned. *See United States v. Thompson*, 287 F.3d 1244, 1251 (10th Cir.2002); *United States v. Edwards*, 777 F.2d 644, 647 (11th Cir.1985); *United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir.1979).

Hawkins also complains that because the original indictment has remained under seal, his counsel has never been able to determine whether the first superceding indictment relates back to the original indictment. The district court conducted an *in camera* comparison of the original indictment to the first superceding indictment and determined that the only difference between the two was the removal in the latter of the identity of an

unindicted coconspirator. Our review confirms this minor change, which, since it does not alter or amend the charges against the defendants in any way, does not offend the statute of limitations.

This is not to say, however, that it was proper for the indictment to indefinitely remain under seal in the district court. Pearson and the government acknowledge that the identity of the coconspirator named in the original indictment has been publicly revealed. This court has repeatedly recognized the paramount importance of providing public access to court proceedings, especially in criminal matters. *See, e.g., In re Associated Press v. Ladd*, 162 F.3d 503, 509-10 (7th Cir.1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994). At the very least, once the identity of the unindicted coconspirator became known, the indictment should have been unsealed, and it is, as of this date, unsealed.[2]

Defendants' second statute of limitations argument is that changes made to the conspiracy count in the second superceding indictment materially broadened the charge, preventing it from "relating back" to the original indictment, and leaving it time-barred. The second superceding indictment modified the end date of the conspiracy from February 1996 to September 2000 and added three overt acts which occurred during that time. Defendants argue that the three acts—Hawkins's preparation of

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[2] We remind litigants that under Seventh Circuit Operating Procedure 10, "[e]xcept to the extent portions of the record are required to be sealed by statute . . . every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by . . . this procedure."

Marks's false affidavit, his preparation of a phony consulting agreement, and his false testimony about the consulting agreement—were not part of the wire fraud conspiracy and thus expanded the alleged crime. However, "the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy." *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir.1966). Here, the uninterrupted success of the conspiracy turned on defendants' ability to continuously conceal the truth about the defective batteries from consumers and Exide shareholders. Hawkins's acts to prop up the scheme were an integral part of the continuing actions of deceit. We find that defendants were on notice of the charges pending against them because "the initial indictment informed appellant[s] in no uncertain terms that [they] would have to account for essentially the same conduct with which [they were] ultimately charged in the superceding indictment," *United States v. O'Bryant*, 998 F.2d 21, 24 (1st Cir.1993), and therefore the second superceding indictment did not violate the statute of limitations.

B. Venue

We next examine Pearson and Hawkins's arguments that venue was not proper in the Southern District of Illinois. We review claims of improper venue to determine "whether the government proved by a preponderance of the evidence that the crimes occurred in the district charged, viewing the evidence in the light most favorable to the government." *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir.2000). Article III of the Constitution stipulates that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," § 2, cl. 3, and the Sixth Amendment similarly requires that "[i]n all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." These Constitutional conditions also are echoed in Federal Rule of Criminal Procedure 18, which dictates that a criminal prosecution must occur "in a district in which the offense was committed." Because the wire fraud statute does not contain a specific statutory venue provision, the general venue provision for offenses that occur in more than one state or district, 18 U.S.C. § 3237(a), applies here: "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

Defendants contend that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois. In cases interpreting the application of § 3237(a), this court has held that "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime.' " *United States v. Ringer,* 300 F.3d 788, 792 (7th Cir.2002) (quoting *Ochoa,* 229 F.3d at 636).

In *Ringer,* the defendant was charged with making false statements to federal officers in the Eastern District of Kentucky and was tried in the Southern District of Indiana. *Id.* at 790. We held that venue was proper in the Southern District of Indiana because, although the statements occurred elsewhere, they were intended to influence a trial set to occur in the Southern District of Indiana, and the materiality of the statements was an

element of the crime. *Id.* at 792. Similarly, in *United States v. Frederick*, 835 F.2d 1211, 1212 (7th Cir.1987), venue was proper in the Northern District of Illinois when a defendant was charged with witness tampering that occurred in the Southern District of Florida but was intended to affect a trial in the Northern District of Illinois. We explained that "[p]roper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 1215.

In the instant case, defendants intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.

These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. *See United States v. O'Brien*, 119 F.3d 523, 532 (7th Cir.1997); *see also* 18 U.S.C. § 1343. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United States v. Rodriguez-Moreno*, 526 U.S. 275, 280, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (upholding venue in prosecution of firearm offense where crime of violence, an essential element of the firearm offense, occurred in the trial district), and Pearson and Hawkins's crime of

wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.[3]

Hawkins also complains that venue was improper as to the conspiracy count. Both the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud. "As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there." *United States v. Molt*, 772 F.2d 366, 369 (7th Cir.1985). Venue for both the conspiracy and substantive wire fraud counts was proper in the Southern District of Illinois.

C. Discovery and Pretrial Rulings

Defendants also raise several objections to pretrial rulings by the district court, and we review their complaints keeping in mind that "[d]istrict courts have broad discretion in discovery matters." *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 646 (7th Cir.2001). We review discovery challenges for abuse of discretion, and "[w]e shall not reverse the district court's ruling absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to [defendants]." *Id.* at 646; *see also United States v. Avery*, 208 F.3d 597, 601 (7th Cir.2000). We note at the outset that the government maintained an open-file policy in this case, by which defendants, through their copy vendor, could copy all of

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[3] Although neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir.2002), the Ninth Circuit held that venue for a wire fraud offense may only "lie where there is a direct or causal connection to the . . . wires." This approach differs with the rubric we have established for analyzing venue in *Frederick*, *Ochoa*, and *Ringer*, and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*.

the government's records, and the district court observed that defendants had "extraordinary access" to documents in this case. Furthermore, defendants have failed to show actual prejudice from any of the issues they have raised with the discovery process. Despite this fatal flaw, we will briefly discuss their contentions for the sake of completeness.

We first review the district court's rejection of defendants' motion for a continuance. In late January 2002, Pearson moved for a trial continuance, the third such request made by defendants. Defendants argue that they needed more time to prepare for trial because 86 boxes of discovery material had not yet been copied by defendants' copy vendor, and because of the large volume of documents. Importantly, defendants do not argue that the government did not make the 86 boxes of documents available to them, only that the log maintained by the U.S. Postal Inspector's Office to account for the government boxes being taken for copying by defendants' copy vendor indicated that 86 boxes had not yet been copied.[4] After providing defendants free and open access to the documents through its open-file policy, the government was under no obligation to ensure that defendants took advantage of the open files by actually copying or reviewing each box. Further, although there was a large amount of discovery to review in preparation for trial, defendants had one year from the date of the first superceding indictment and seven and one-half months from the date of the second superceding indictment to prepare for trial. We do not find any abuse of discretion in the district court's denial of defendants'

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[4] Defendants also complain about an additional 23 boxes that the log indicates were received by defendants' copy vendor, but of which defendants did not receive copies. This seems to be a problem more properly addressed to the copy vendor, not to the court.

motion for a continuance, as defendants had adequate time and access to discovery in order to prepare for trial.

Second, we consider defendants' argument that the district court should have required the government to provide defendants with a list of potential witnesses and a list of its trial exhibits. Despite the fact that Federal Rule of Criminal Procedure 16 addresses many of the defendants' concerns, their briefs are noticeably silent as to the Rule's provisions. Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents . . . or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

As we have noted before, the law is clear that neither the Constitution nor Rule 16 entitles a defendant to a list of all prospective witnesses before trial in a noncapital case. *See United States v. Napue,* 834 F.2d 1311, 1317 (7th Cir.1987).[5] The district court may require the government to provide a witness list, *see United States v. Edwards,* 47 F.3d 841, 843 (7th Cir.1995); *United States v. Jackson,* 508 F.2d 1001, 1006 (7th Cir.1975), but, as

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[5] We note that defendants do not argue that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500(b), which requires the government, upon defendants' motion, to produce statements made by any of its witnesses which the particular witnesses signed, adopted, or approved, and which pertain to their testimony at trial. Instead, defendants' argument focuses on the provision of a list of witnesses before they took the stand.

Congress recognized when it declined to include such a requirement in Rule 16, a district court may also choose not to exercise that prerogative, since providing a witness list might in some cases discourage witnesses from testifying or lead to " 'improper contact directed at influencing their testimony.' " *Napue*, 834 F.2d at 1317 (quoting H.R. CONF. REP. NO. 94-414 (1975), *reprinted in* U.S.S.C.A.N. 674, 713, 716). With respect to the provision of an exhibit list, defendants admit that they received copies of the exhibits themselves, and they limit their complaint to the lack of a list of the exhibits to aid in their organization for trial. As noted earlier, Rule 16 requires the government to make certain physical objects and documents available for inspection and copying, but it is silent as to any responsibility by the government to provide an organizational guide to those materials for defendants. Although provision of an exhibit list likely would have made this trial more efficient for all involved, and we certainly encourage parties to exchange them pretrial, we cannot find the district court abused its discretion for failing to order the government to furnish lists that Rule 16 does not require it to provide.[6]

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[6] Because the government did provide the district court with a courtesy copy of an exhibit list, defendants also argue that the government's failure to provide them with the same list constituted *ex parte* communication in violation of *United States v. Culp*, 7 F.3d 613 (7th Cir.1993). *Culp* rightly noted that the government has a professional obligation under ABA Model Rule of Professional Conduct 3.5(b) to provide a copy to defense counsel of "any papers, documents or exhibits he files with the court in order to avoid an *ex parte* contact with the judge." *Id.* at 616 n. 1. Despite the fact that defendants' *ex parte* argument misses the mark—no information was hidden from them since they had copies of the exhibits themselves—we emphasize that simply providing a copy of the exhibit list to the defendants would have avoided this unnecessary dispute.

Next, defendants argue that the district court erred in rejecting their motion to compel the production of approximately 3800 allegedly-defective batteries that the government obtained from Sears. Defendants allege that, despite the fact that the batteries were never introduced at trial, the government's refusal to turn over the batteries compromised their ability to defend against the accusation that the batteries were defective because they could not have the batteries tested to determine their quality. The batteries were never analyzed by any party, and the government contends that they could not have been tested because their condition had deteriorated to a point that made reliable testing impossible. Defendants disagree and argue that testing would have been merely difficult, not impossible. Rule 16 requires the government to provide access to objects "which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." In *United States v. Armstrong*, 517 U.S. 456, 462, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Court held that "material to the preparation of the defendant's defense" means "the defendant's response to the Government's case in chief," and does not include materials deemed by defendants to be necessary to prove their own defense theory or to challenge the prosecutor's conduct of the case. Defendants argue that even though the 3800 batteries were not part of the government's case, test results could have been used to respond generally to the government's allegations that the batteries were defective. But even if we assume that the batteries could have been tested and we assume that defendants could have used test results to defend against the government's case in chief under *Armstrong*, it is difficult to imagine how defendants could have suffered actual prejudice from the lack of access to the batteries. When Exide pled guilty,

it stipulated that the batteries were manufactured and distributed with latent defects. On the other hand, we fail to see what harm could have come from the government turning over the batteries. But given the uncertainty about the condition of the batteries and Exide's stipulation that the batteries were in fact defective, we do not think the district court's denial of defendants' motion to compel the batteries rises to an abuse of discretion.[7]

Finally, defendants allege that the government improperly failed to turn over several documents in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a *Brady* violation, defendants must show "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *United States v. Silva,* 71 F.3d 667, 670 (7th Cir.1995). Defendants offer three "examples" of *Brady* violations, but in each case fail to articulate why the evidence sought was not available to defendants through the exercise of due diligence. *See United States v. O'Hara,* 301 F.3d 563, 569 (7th Cir.2002). They first point to the government's refusal to turn over the grand jury testimony of Tim Findlay, who, according to Pearson, coordinated an Exide management buy-out plan to purchase Kmart's auto centers. Putting aside their failure to explain the relevance of Findlay's grand jury testimony to the case at bar, the district court found, and defendants do not dispute, that Findlay was available to be called as a witness for the defense. Defendants' other

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[7] Defendants also object to the district court's refusal to compel production of a CD-Rom holding battery data. The CD-Rom contained an inventory of manufacturing codes and internal serial numbers that were placed on the batteries. We do not see how this information is relevant to defendants' case, and we find no error in the district court's decision to deny defendants' motion to compel.

Brady allegations are equally unconvincing. They posit that the government should have turned over the debriefing notes of a co-defendant who pled guilty and agreed to cooperate with the government, and that it should have provided the grand jury testimony of defendant Hawkins's son, Lee Hawkins. These strike us as witnesses who would be easily available to defendants, and defendants have not explained to the contrary. Under these circumstances, we find no error under *Brady* in the district court's refusal to order the government to turn over these materials.

D. Impeachment Evidence

Defendants further contend that the district court erred when it did not allow defendants to introduce certain documents in their cross-examination of Joseph Calio. Evidentiary rulings by the district court are reviewed by this court for abuse of discretion. *United States v. Nedza*, 880 F.2d 896, 903 (7th Cir.1989). Calio generally testified that he was obtaining money for bribes through wire transfers from Exide and covering it up by signing backdated documents that provided false reasons for the wires. He was also a key witness against Pearson, and he described Pearson's active role in the conspiracy. At trial, defendants attempted to introduce documents that they claim would have provided a legitimate explanation for the wire transfers that Calio testified were fictitious. These documents included airline tickets for European travel in 1995, a passport showing that Calio landed in London in 1995, and an American Express statement including a charge for plane tickets, which defendants apparently sought to support a theory that Calio used the money wired to him by Exide to purchase a personal vacation to Europe rather than to bribe Marks. The government argued that there was no connection between

the documents and the bribe money wired to Calio. The district court agreed, finding the documents would be very misleading to the jury, and relied on Federal Rules of Evidence 403 and 608(b) to exclude them. Given the district court's factual finding that the documents were unrelated to the fraudulent transfer, we find no abuse of discretion in the district court's exclusion of the potentially misleading documents. *See United States v. Thomas*, 321 F.3d 627, 630 (7th Cir.2003) ("The balancing of probative value and prejudice is a highly discretionary assessment, and we accord the district court's discretion great deference, only disturbing it if no reasonable person could agree with the ruling."); *Chase v. Consol. Foods Corp.*, 744 F.2d 566, 571 (7th Cir.1984) ("Since the trial judge has the feel of the jury in a way that the appellate court cannot, his ruling [excluding potentially misleading evidence] will rarely be disturbed on appeal.").

Defendants also contend that the court erred in ending the defense's examination of Calio. The court excused Calio from the witness stand after a hearing in chambers in which the government argued that Pearson's attorney suggested to Calio's counsel that Calio may have breached his plea agreement with the government, that he should assert his Fifth Amendment privilege against self-incrimination, and the defense would then move to strike all of Calio's testimony. At the time the district court ended Calio's testimony, Calio had testified as a government witness for three days, including substantial cross-examination by defendants, and had then been recalled by defendants as a witness for the defense. Defendants claim that, as a result of the court's ruling, they did not have the opportunity to examine Calio as to certain conversations he had with government witness Rick Randalls, although defendants do not explain the

significance of this evidence or why it had not been discussed with the witness earlier.

During the three and one-half days Calio had been on the stand, the defense had ample opportunities to impeach Calio on many different issues. "Merely cumulative evidence is excludable, as having little probative value, Fed.R.Evid. 403; merely cumulative impeachment evidence likewise." *United States v. Boyd*, 55 F.3d 239, 246 (7th Cir.1995). Defendants thoroughly questioned Calio on issues including discrepancies in his accounts of alleged meetings with the defendants, misstatements in a deposition with the Florida Attorney General, tax evasion, his possible bias against Pearson including statements that he "hated Pearson" and had commented on Pearson's sexual orientation, and the fact that he received a deal from the government for his testimony. They do not explain why additional testimony from Calio would have been anything but cumulative. "Determining whether testimony is cumulative rests within the sound discretion of the district court," *United States v. Gardner*, 211 F.3d 1049, 1055 (7th Cir.2000), and we find no abuse of discretion by the district court in ending Calio's testimony.

Hawkins and Pearson raised a number of other issues in their appeals, and although we have considered each of these arguments, we conclude that they are without merit and are of insufficient importance to discuss here.

III. CONCLUSION

Accordingly, we AFFIRM the convictions and sentences of the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 04-CV-0487-DRH

DOUGLAS PEARSON,

Plaintiff,

—v.—

UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM AND ORDER

HERNDON, District Judge:

Pending before the Court is Pearson's motion for certificate of appealability (Doc. 9). Based on the following, the Court grants the motion.

After a three month jury trial, the jury found Pearson guilty of conspiracy to commit wire fraud and wire fraud on June 20, 2002. Thereafter on December 20, 2002, the Court sentenced Pearson to 64 months imprisonment. Pearson timely appealed both his conviction and sentence to the Seventh Circuit Court of Appeals. On August 14, 2003, the Seventh Circuit denied Pearson's appeal. On July 13, 2004, Pearson timely filed his 2255 petition. Pearson argues that he is entitled to relief in

light of the Supreme Court's recent decision in *Blakely v. Washington,* 524 U.S. — , 124 S.Ct. 2531 (U.S. June 24, 2004,)—declaring unconstitutional sentencing enhancements that are based on judicial fact finding under the United States Sentencing Guidelines—and the Seventh Circuit's recent decision in *United States v. Booker,* 375 F.3d 508 (7th Cir. July 9, 2004), *cert. granted,* 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104). Pearson maintains that the Court improperly applied sentencing enhancements that violated his Sixth Amendment rights. On August 19, 2004, the Court dismissed without prejudice Pearson's § 2255 petition (Doc. 8). Thereafter, Pearson filed his notice of appeal (Doc. 10) and filed a motion for certificate of appealability (Doc. 9). Because Pearson has made the required showing, the Court grants the motion for certificate of appealability.

28 U.S.C. § 2253(c)(1) provides that an appeal "may not be taken" from a final order in a § 2255 proceeding unless a certificate of appealability first is issued. Similarly, FEDERAL RULE OF APPELLATE PROCEDURE 22(b)(1) requires: "in a . . . § 2255 proceeding, the applicant cannot take an appeal unless . . . a circuit or district judge issues a certificate of appealability. . . ." 28 U.S.C. § 2253(c)(2) clarifies that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." "Under the controlling standard, a petitioner must 'show that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (citations omitted).

Pearson argues that under *Blakely/Booker* his sentence should be vacated and remanded for resentencing because the enhancements he received were based on non jury determinations. In light of the discord stemming from *Blakely* and its progeny, the Court finds that Pearson has made a substantial showing of a denial of a constitutional right. Thus, the Court GRANTS Pearson's motion for certificate of appealablity (Doc. 9). The Court ISSUES Pearson a certificate of appealability in this matter.

IT IS SO ORDERED.

Signed this 12th day of October, 2004.

/s/ David RHerndon
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 04-CV-0487-DRH

DOUGLAS PEARSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. *Introduction and Background*

On July 13, 2004, Douglas Pearson petitioned this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Having closely examined the record before it, the Court concludes that an evidentiary hearing is not needed in this matter. *See Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002) ("for a hearing to be granted, the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner [has] actual proof of the allegations

going beyond mere unsupported assertions"); *Menzer v. United States*, 200 F.3d 1000, 1005 (7th Cir. 2000) (hearing not required where record conclusively demonstrates that a defendant is entitled to no relief on § 2255 motion); *Oliver v. United States*, 961 F.2d 1339, 1343 n.5 (7th Cir.) (court need not hold evidentiary hearing to decide § 2255 claims that raise factual matters capable of being resolved on the existing record), *cert. denied*, 506 U.S. 976 (1992). *See also*, Rules 4(b) and 8(a) of RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS; *Aleman v. United States*, 878 F.2d 1009, 1012 (7th Cir. 1989) (judge should dismiss § 2255 petition without hearing, if it appears from the facts of the motion, exhibits, and prior proceedings in the case that the movant is not entitled to relief).

After a three month jury trial, the jury found Pearson guilty of conspiracy to commit wire fraud and wire fraud on June 20, 2002. Thereafter on December 20, 2002, the Court sentenced Pearson to 64 months imprisonment. Pearson timely appealed both his conviction and sentence to the Seventh Circuit Court of Appeals. On August 14, 2003, the Seventh Circuit denied Pearson's appeal. On July 13, 2004, Pearson timely filed his 2255 petition. Pearson argues that he is entitled to relief in light of the Supreme Court's recent decision in *Blakely v. Washington*, — U.S. — , 124 S.Ct. 2531 (U.S. June 24, 2004,) —declaring unconstitutional sentencing enhancements that are based on judicial fact finding under the United States Sentencing Guidelines—and the Seventh Circuit's recent decision in *United States v. Booker*, 375 F.3d 508 (7th Cir. July 9, 2004), *cert. granted*, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104). Pearson maintains that the Court improperly applied sentencing enhance-

ments that violated his Sixth Amendment rights. Based on the following, the Court denies Pearson's motion.

II. *Analysis*

In support of his petition, Pearson argues that at the time of his sentencing, the Court improperly applied enhancements pursuant to the Sentencing Guidelines. Pearson brings this petition based upon *Blakely* and *Booker.*

However, a very recent decision by the Seventh Circuit sucks the wind from the sails of this argument. In *Simpson v. United States,* — F3d — 2004 WL 1636965 (7th Cir. July 23, 2004), Circuit Judge Rovner (writing for the Seventh Circuit) found:

> The rule announced in *Blakely* . . . was not dictated or compelled by *Apprendi* or its progeny. In fact, before *Blakely was* decided, every federal court of appeals held that *Apprendi* did not apply to guideline calculations made within the statutory maximum. . . . Assuming that the Supreme Court announced a new constitutional rule in *Blakely* and that Simpson's sentence violates that rule, the proposed claim is premature. The *Supreme* Court has not made the *Blakely* rule applicable to cases on collateral review. . . . Should the Supreme Court announce that *Blakely* applies retroactively to cases on collateral review, Simpson can file a renewed (§ 2255] application.

Id. at * 2. Thus, *Blakely* does not apply retroactively to secure § 2255 relief for Pearson at this time.

III. *Conclusion*

Accordingly, the Court DENIES and DISMISSES without prejudice Pearson's § 2255 petition. Because of this analysis, Pearson's motion to stay (Doc. 4) is denied.

IT IS SO ORDERED.

Signed this 19th day of August, 2004.

/s/ David RHerndon
DAVID R. HERNDON
United States District Judge

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA

—v.—

DOUGLAS PEARSON

Date of Original Judgment: 12/20/2002
(Or Date of Last Amended Judgment)
Reason for Amendment:

☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))

☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:01CR30006-003 DRH
Harold Ruvoldt, Jr.
Defendant's Attorney

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. §§ 3664)

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

THE DEFENDANT:

☐ pleaded guilty to count(s)_____

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

☒ was found guilty on count(s) 1 and 2 of the Second Superseding Indictment after a plea of not guilty.

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
18 U.S.C. § 371	Conspiracy to Commit Wire Fraud	09/01/2000*	1
18 U.S.C. § 1343	Wire Fraud	02/1996*	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s)_____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, Residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 146-38-6245

Defendant's Date of Birth: 07/20/1943

Defendant's USM No.: 05581-025

Defendant's Residence Address:

2820 River Road

New Hope, PA 18938

Defendant's Mailing Address:

01/16/2003
Date of Imposition of Judgment

/s/ DAVID R. HERNDON
Signature of Judicial Officer

DAVID R. HERNDON, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

1/21/2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 64 months .
This term consists of a term of 32 months on each of Counts 1 and 2, said terms to run consecutively.

☒ The court makes the following recommendations to the Bureau of Prisons: The court recommends that the defendant be confined at FCI Fairton camp

☐ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district:

☒ at 12:00 ☐ a.m. ☒ p.m. on January 2, 2003

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2. p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

_____
UNITED STATES OF MARSHAL

By _____
DEPUTY UNITED STATES OF MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years

This term consists of a term of two years on each of Counts 1 and 2, said terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall participate as directed and approved by the probation officer for treatment of narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility. Any participation will require complete abstinence from all alcoholic beverages.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$200.00	$150,000.00	$

☐ The determination of restitution is deferred until ____ _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution	Priority Order or Percentage of Payment

TOTALS $_____ $_____

☒ The above fine includes costs of incarceration and/or supervision in the amount of $124,767. 44*

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
☒ the interest requirement is waived for the ☒ fine and/or ☐ restitution.
☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below; or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g,, months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $ see below per month, or % of defendant's earnings, whichever is greater.

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay the fine in installments of $5,000.00 per month or ten percent of his net monthly income, whichever is greater.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 70 months

Supervised Release Range: 2 to 3 years

Fine Range: $122,500.00 to $3,946,800.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pur-

suant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663 A(c)(3)(A).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110A, 111A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

STATEMENT OF REASONS
(Not for Public Disclosure)

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following

OR

☐ The sentence departs from the guideline range:
☐ upon motion of the government, as a result of a defendant's substantial assistance, or
☐ for the following specific reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOS

December 20, 2002

UNITED STATES OF AMERICA,
Plaintiff,

—vs.—

ARTHUR M. HAWKINS and DOUGLAS N. PEARSON,
Defendants.

SENTENCING HEARING
BEFORE THE HONORABLE DAVID R. HERNDON

APPEARANCES:

For the Plaintiff:	Miriam F. Miquelon United States Attorney Assistant U.S. Attorney Fairview Heights, IL 62208
For Defendant Pearson:	Harold J. Ruvoldt Cathy Fleming Edwards & Angell New York, NY 10022
Court Reporter:	Jennifer Robertson U.S. District Court East St. Louis, IL 62201

Proceedings recorded by mechanical stenography, transcript

[2] (Court convened.)

THE COURT: Let the record reflect that we are in open court. We've called the case of United States of America vs. Douglas Pearson. Our docket number is 01-30006-003. Let the record reflect that the United States Attorney Miriam Miquelon is present, together with Assistant United States Attorney Hal Goldsmith.

Good morning, Ms. Miquelon. Are you ready to proceed?

MS. MIQUELON: Good morning, Your Honor. The Government answers ready.

THE COURT: Let the record further reflect that the defendant is present in Court together with his counsel Harold Ruvoldt and Cathy Fleming.

Mr. Ruvoldt, good morning.

MR. RUVOLDT: Good morning, Your Honor. We are ready to proceed. Miss Fleming will argue the PSR.

THE COURT: Okay. Miss Fleming, first of all, let me just establish that there was a statement in your, at the end of the defendant's objections which adopted the factual and legal objections made by co-defendant Hawkins, and you were here yesterday, together with Mr. Ruvoldt and Mr. Pearson, throughout the lengthy session that we had with Mr. Hawkins and Mr. Stilley, and you appeared to me to at least to be very attentive throughout the day and had the

* * *

[18] for Mr. Pearson to receive an enhancement, and that 290 alone does move him up over a level. Your Honor had a figure of 1.5 something. That 290 moves him

down. It would really be an anomaly to go up one level with Mr. Pearson being hit with the HB&M kickbacks to Mr. Calio, when Mr. Calio was not.

MS. MIQUELON: Your Honor, you didn't even consider the 290 in reaching the 1.5 million yesterday.

THE COURT: That's correct. I kept the 290 out, as a matter of fact. Under either figure, leaving the 290 out still had the figure above 1.5.

MS. FLEMING: I respectfully suggest as we go through, I have some pretty good—I mean, I'm hoping to get rid of all six points, but I think I have some factual arguments that get me down at least one more.

THE COURT: All right.

MS. FLEMING: The case law has not hit the Seventh Circuit yet, and I am very familiar with case law in the circuits that talk about what the standards of proofs are. When someone is seeking an enhancement the burden's on the Government to show by a preponderance. There is a couple exceptions where it's clear and convincing. The defendant is seeking a downward, it's their burden. There is some case law that is starting to develop. I will apologize, I really thought I had put it in my objections, and I did not, and I hope the Court will allow me to make the objection now. **[19]** There is nothing in the Seventh Circuit that has adopted this yet, maybe they will in the future, but there is some case law.

One of the cases is called State vs. Apprendi. It's a New Jersey Supreme Court case, which I know is a New Jersey Supreme Court case, but it basically says—but I believe, although I'll not swear to it, it's up for being reviewed by the United States Supreme Court, which says in matters of enhancement, not the statutory penalties, but where something would enhance a sentence,

that the standard of proof really should be beyond a reasonable doubt when it includes another penalty. So, I know Your Honor can make sure—I would just like to make the argument that if there is going to be an enhancement, I would like the standard to be beyond a reasonable doubt. I acknowledge the Seventh Circuit has not done it, but I would like to make that argument and point here.

MS. MIQUELON: The only thing I would like to say is that misstates the holding in Apprendi, and the Seventh Circuit does not adopt that ruling specifically, and it deals with enhancements in drug-type cases and drug penalties. It's completely inapposite to this case, Your Honor.

THE COURT: Go ahead.

MS. FLEMING: In any event, Judge, do you want

* * *

[47] THE COURT: Okay. First of all, with respect to the difference between this case and Calio, clearly Calio was different. Mr. Calio pled guilty to wire fraud. He did not plead guilty to conspiracy. He was not involved in the same overall scheme that Mr. Pearson was involved in. He had a different position in the company, was not the kind of officer within the company that Mr. Pearson was, was not a member of the board, did not have the same involvement in the overall conspiracy that Mr. Pearson had. So, the relevant conduct situation is entirely different, so, there wasn't that consideration with respect to Mr. Calio. So, Mr. Calio—or with regard to Mr. Calio and Mr. Pearson, so Mr. Calio wasn't getting special treatment here.

Secondly, while I appreciate the invitation to lead the way in the Seventh Circuit on a different burden of proof in this matter, I'll decline that invitation and let somebody else take the lead on establishing the burden of beyond a reasonable doubt on these matters, let some more wiser and bolder judge take that lead. So far as I can tell the Seventh Circuit is not doing that, and from the case law that I've read, I don't see an inclination at this point to do that, and I think that at this point the burden is still one of a preponderance, and will remain a preponderance in this Court until the Seventh Circuit tells me different. Maybe they'll do that in this case, but they'll have to do **[48]** that for me.

As far as this particular analysis is concerned, I agree with Ms. Miquelon. I believe that the analysis that the Probation Office applied is one of looking to the overall common scheme or plan and the course of conduct, and while they mentioned what the agent was doing with respect to foreseeability, I don't believe that's the analysis that they applied. But, frankly, in the end of the analysis, I'm not sure it makes a lot of difference, because in looking to the Government's theory in this case, throughout the case we obviously heard evidence that supported the theory that Exide did, in fact, have a way of doing business, and that way of doing business was one of basically buying people. They paid people amongst their customers to insure that they were able to do business with those people. They bought not only people, but they bought, in the case of Kan Labs they bought results, so that they could obtain the results that they needed to make themselves look better than they actually were in terms of the product that they were putting out into the market, even to the extent, as I recall, so that they looked better in Consumer Reports than they actually were.

So, they had this overall modus operandi of simply owning as many people and entities as they could to make sure that they didn't have to compete on their product,

* * *

[70] cover this conduct now, and it wasn't enacted at the time. I agree with that.

THE COURT: Well, certainly, Miss Fleming makes a good argument for Mr. Pearson, and a lot of it makes sense, but then so does Ms. Miquelon. The key to Mr. Pearson's role in this case obviously does boil down in large part to Mr. Calio, unfortunately. And if I put the two side-by-side, I more often than not would probably believe Mr. Pearson, if I ever had a conversation with him. I don't know that I ever have had. But a lot of what Mr. Calio said I probably would choose not to believe. But there was sufficient corroboration for the "just do it" comment, and I think it's believable certainly by a preponderance of the evidence that that comment was made because, as Ms. Miquelon said, it fit in with the other evidence of what, of how Mr. Pearson approached things. And I think it also fits in with your argument that he was there and wasn't the major architect of this whole thing. We know that Hawkins was. But as Ms. Miquelon points out, if he wasn't the president, it would be a different situation. The fact that he, in key aspects of this conspiracy, was the president, places him in a position because he's doing that of facilitating in a very major and significant way this conspiracy. And it's because he's the president, because he's supervising Calio, because he's in that role, and because he's telling Calio "just do

* * *

[77] that bond. They fought giving them any kind of security in any of these funds because they wanted to make sure they were taken care of, but Exide shouldn't be taken care of. And now Exide's out that money. So, this is, you know, I'm sorry, but this is disingenuous accounting the way this was all handled.

THE COURT: Any other objections from the defendant with respect to the Presentence Report?

MR. RUVOLDT: No, Your Honor.

THE COURT: Any objections by the Government to the Presentence Report?

MS. MIQUELON: Other than being heard on the downward departure, Your Honor, nothing.

THE COURT: The Court having ruled on the objections, the Court makes the following findings with respect to the defendant's conduct in this matter. The Court notes that the 1998 edition of the Guidelines Manual was utilized pursuant to Guideline Section 1B1.11(b)(1). Further notes that Counts 1 and 2 are grouped together into a single group of closely-related counts, as the Offense Level is determined based upon the total amount of aggregate harm or loss pursuant to Guidelines Section 3D1.2(d). We have in this matter a jury verdict of guilty in two counts, Count 1, conspiracy to commit wire fraud; Count 2, wire fraud.

Pursuant to 18 United States Code, Section [78] 1343 the Guidelines Section 2F1.1 calls for a Base Offense Level of a 6. Pursuant to the Court's previous finding of loss or relevant conduct, that falling within the range of 1.5 million and 2.5 million dollars, the offense level is increased by 12 levels, pursuant to 2F1.1(b)(1)(M. Pursuant to the Court's finding that more than minimal plan-

ning was involved consistent with 2F1.1(b)(2)(A), two offense levels are added. The Court then finds that the mass marketing characteristic is applicable pursuant to the advertising campaign pursued in the course of this conduct, and two levels are added pursuant to 2F1.1(b)(3). No victim-related adjustments are added.

Pursuant to the Court's finding as to Mr. Pearson's role as an organizer, leader, manager or supervisor in this conspiracy, two levels are added under 3B1.1(c). Since the defendant's conduct constituted abuse of his position of public and private trust, two levels are added consistent with the requirements of 391.3.

There is no adjustment for obstruction of justice in this case, giving us an Adjusted Offense Level of a 26. There is no adjustment for acceptance of responsibility. He suffers no Chapter 4 enhancements, and therefore, remains at a an Offense Level of a 26.

No computable criminal history. Therefore, he is at a Offense Level 26, Criminal History Category I.

* * *

[102] So, even though the discretion is there, I don't think the circumstances are such that I have the appropriate facts at hand to depart downward. I don't think that it would be an appropriate exercise of my discretion to depart downward. I don't think we have the appropriate circumstance here to allow me to depart downward. I don't find that I have a circumstance that I feel I should depart downward. So, the Motion for Downward Departure is denied, and I don't think there is a legal basis to depart downward because you're not Art Hawkins. I understand that argument, but I think that's not a legal basis, either.

As we move on to the phase for the imposition of sentence, does the Government have anything to offer by way of argument at this point?

MS. MIQUELON: No, Your Honor.

THE COURT: Does the defense have anything further to offer at this point?

MR. RUVOLDT: Nothing further, Your Honor.

THE COURT: I don't mean to make this some sort of dramatic suspense, I just need to do one other thing with respect to the fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Douglas Pearson, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 32 months on each count by **[103]** virtue of Section 5G1.2(b) and (d), to be served consecutively, for a total sentence of 64 months. It is further ordered that the defendant shall pay to the United States a total fine of $150,000. That consists of $100,000 on Count 1, $50,000 on Count 2. The fine is payable through the Clerk of the United States District Court. The fine is due immediately. If the defendant is unable to satisfy the fine during his period of incarceration, the payment of any unpaid balance shall become a condition of Supervised Release.

The Court finds that the interest in this matter is waived. The costs of imprisonment and supervision are considered within the amount of the fine.

Upon release from imprisonment the defendant shall be placed on Supervised Release for a period of—for a term of two years. This term consists of two years on Counts 1, and a term of two years on Count 2, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant

shall report in person to the Probation Office in the district to which he is released. While on Supervised Release, the defendant shall not commit another federal, state or local crime, and shall comply with the standard conditions that have been adopted by this court.

The defendant shall not illegally possess a

* * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

General Docket

Filed: 10/15/04

Court of Appeals Docket #: 04-3650
Nsuit: 2510 Pris Pet Vac Sentence-US Def
Appeal from: United States District Court

Lower court information:

District: 0754-3 : 04 C 487
Ordering Judge: David R. Herndon, Judge
Court Reporter: Laura Blatz, Court Reporter
Date Filed: 7/13/04
Date order/judgment: 8/19/04
Date NOA filed: 10/7/04

Fee status: paid

Prior cases:

02-4356 idr dpw acw
Date filed: 12/30/02 Date disposed: 8/14/03
Disposition: AFFIRMED
02-4356 idr dpw acw
Date filed: 12/30/02 Date disposed: 8/14/03
Disposition: AFFIRMED

Current cases:
None

Docket as of February 8, 2005 11:03 pm Page 1

04-3650 Pearson, Douglas N. v. USA

DOUGLAS N. PEARSON
Petitioner-Appellant

Harold J. Ruvoldt
Fax 212/308-4844
212/308-4411
[COR LD NTC ret]
EDWARDS & ANGELL
750 Lexington Avenue
New York, NY 10022-1208
USA

—v.—

UNITED STATES OF AMERICA
Respondent-Appellee

Hal Goldsmith
FAX 618/628-3730
618/628-3700
[COR LD NTC ret]
OFFICE OF THE UNITED STATES ATTORNEY
Criminal Division
Nine Executive Drive
Fairview Heights, IL 62208
USA

04-3650 Pearson, Douglas N. v. USA

DOUGLAS N. PEARSON,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

04-3650 Pearson, Douglas N. v. USA

10/15/04	Federal prisoner's 2255 case docketed. Certificate of Appealability granted 10/12/04. [04-3650] [1788511-1] Appellant's brief due 11/24/04 for Douglas N. Pearson. Transcript information sheet due 10/25/04. (nath)
10/15/04	Filed Appellant Douglas N. Pearson docketing statement. [04-3650] [1788525-1] (nath)
10/21/04	The Antiterrorism and Effective Death Penalty Act requires approval from the Court of Appeals before a second or successive petition may be filed in the District Court. IT IS ORDERED that the appellee(s) file a statement advising this court whether

	the appellant(s) brought a previous petition challenging the same judgment that the appellant now challenges. (See order for further details) DW [04-3650] Statement due 11/4/04 for USA. (nath)
11/1/04	Disclosure Statement filed by Harold J. Ruvoldt for Appellant Douglas N. Pearson. [04-3650] [1788511-1] (nath)
11/3/04	Filed Seventh Circuit Transcript Information Sheet by Harold J. Ruvoldt for Appellant Douglas N. Pearson. [04-3650] [1788511-1] (nath)
11/5/04	Filed Appellee USA statement advising this court whether the petitioner-appellant brought a previous petition pursuant to Title 28, United States Code, Section 2255. [04-3650] [1788511-1] (nath)
11/8/04	Filed Appellant Douglas N. Pearson Memorandum of Law in support of defendant Douglas N. Pearson's motion for bail pending appeal of denial of his 2255 petition. [1795172-1] [04-3650] [1795172-1] (fern)
11/8/04	Filed 15c appellant's brief by Douglas N. Pearson. Disk filed. [04-3650] [0-0] (kare)
11/8/04	Filed 10c appendix by Appellant Douglas N. Pearson. [04-3650] [1795410-1] (kare)
11/9/04	ORDER re: Respondent-Appellee's statement advising this court whether the petitioner-appellant brought a previous petition pursuant to title 28, united states code, section 2255. Briefing will proceed

as follows: [1788511-1] DW [04-3650] Appellant's brief due 11/29/04 for Douglas N. Pearson. Appellee's brief due 12/29/04 for USA. Appellant's reply brief due 1/12/05 for Douglas N. Pearson. (nath)

11/17/04 ORDER issued DENYING motion for bail pending appeal of denial of his 2255 petition. [1795172-1] LAB [04-3650] (nath)

Docket as of February 8, 2005 11:03 pm Page 4

04-3650 Pearson, Douglas N. v. USA

11/17/04 ORDER: Proceedings in this case are STAYED pending the Supreme Court decision in United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105. The parties shall filed statements of position within 14 days after the Supreme Court opinion issues. [1799236-1] MXF [04-3650] (nath)

1/25/05 Filed Appellant Douglas N. Pearson Statement of Position. [04-3650] [1788511-1] (tiff)

1/26/05 Filed Appellant Douglas N. Pearson Citation of Additional Authority, per CR 28(e). [04-3650] [1821399-1] (tiff)

1/28/05 Filed motion by Appellee USA to extend time to file statement of position. [1821541-1] [04-3650] (tiff)

2/8/05 ORDER: In light of this court's opinion in McReynolds v. United States, 2005 WL

237642 (7th Cir. Feb. 2, 2005), we VACATE the certificate of appealability and AFFIRM the district court judgment denying Pearson's motion to vacate, 28 U.S.C. Section 2255. Circuit Judge Diane P. Wood, Circuit Judge Terence T. Evans, Circuit Judge Diane S. Sykes. [04-3650] [1788511-1] (tiff)

U.S. DISTRICT COURT
Southern District of Illinois CM/ECF System
(East St. Louis)

CIVIL DOCKET FOR CASE #: 3:04-cv-00487-DRH

Pearson v. USA
Assigned to: Judge David R Herndon
Cause: 28:2255 Motion to Vacate/Correct Illegal Sentenc

Date Filed: 07/13/2004
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Petitioner

Douglas N Pearson

represented by **Cathy Fleming**
Edwards & Angell
750 Lexington Avenue
New York, NY 10022
212-756-0329
Email: cfleming@edwardsangell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Harold J. Ruvoldt, Jr.
Edwards & Angell
750 Lexington Avenue
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

v.

Respondent

USA
represented by **Hal Goldsmith**
Assistant U.S. Attorney -
Fairview Heights
9 Executive Drive
Suite 300
Fairview Heights, IL 62208
Email: Hal.Goldsmith@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/13/2004	1	MOTION to Vacate, Set Aside or Correct Sentence (2255) filed by Douglas N Pearson. (Attachments: # 1 Letter to Asst US Attorney)(tjh) (Entered: 07/19/2004)
07/13/2004	2	Memorandum of Law in Support to 1 Motion to Vacate/Set Aside/Correct Sentence (2255) filed by Douglas N Pearson. (Attachments: # 1 Affidavit

		in Support of 28:2255 petition)(tjh) (Entered: 07/20/2004)
07/26/2004	4	Letter from Harold Ruvoldt construed as MOTION to Stay by Douglas N Pearson. (Attachments: # 1 Notice of Re-efiling/Renumbering)(myz) (Entered: 08/04/2004)
07/29/2004	3	ORDER directing govt response to Motion to Vacate, Set Aside or Correct Sentence (2255). Signed by Judge David R Herndon on 7/28/04. (eed) (Entered: 07/29/2004)
08/03/2004	5	ORDER construing letter from Harold Ruvoldt as a motion to stay. Government to respond by August 17, 2004. Signed by Judge David R Herndon on 8/3/04. (klh) (Entered: 08/03/2004)
08/04/2004	6	NOTICE re 4 Motion to Stay filed by Douglas N Pearson. See attached document for specifics (myz) (Entered: 08/04/2004)
08/17/2004	7	RESPONSE to 4 Motion to Stay, 1 Motion to Vacate/Set Aside/Correct Sentence (2255) filed by USA. (Goldsmith, Hal) (Entered: 08/17/2004)
08/19/2004	8	ORDER DENYING AND DISMISSING WITHOUT PREJUDICE PEARSON'S 28 U.S.C. 2255 PETITION 1 and DENYING 4 MOTION to Stay filed by Douglas N Pearson. Signed by Judge David R Herndon on 8/19/04. (klh) (Entered: 08/19/2004)

10/06/2004	9	MOTION for Certificate of Appealability Relative to the Court's Denial of his Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 US 2255 by Douglas N Pearson. (Attachments: # 1 Declaration of Harold Ruvoldt in Support of Motion for Certificate of Appealability# 2 Affidavit of Service) (Ruvoldt, Harold) (Entered: 10/06/2004)
10/07/2004	10	NOTICE OF APPEAL by Douglas N Pearson. (myz) (Entered: 10/07/2004)
10/07/2004	11	JURISDICTIONAL STATEMENT by Douglas N Pearson re 10 Notice of Appeal (myz) (Entered: 10/07/2004)
10/07/2004	12	Circuit Rule 10 Letter to counsel. (myz) (Entered: 10/07/2004)
10/07/2004		Transmission of Short Record to US Court of Appeals re 10 Notice of AppealAppeal Record due to be prepared by 10/21/2004. (myz) (Entered: 10/07/2004)
10/12/2004	13	ORDER granting 9 Motion for Certificate of Appealability. Signed by Judge David R Herndon on 10/12/04. (klh,) (Entered: 10/12/2004)
10/19/2004	14	DESIGNATION of Record on Appeal by Douglas N Pearson re 10 Notice of Appeal (Ruvoldt, Harold) (Entered: 10/19/2004)

10/25/2004	15	USCA Case Number 04-3650 for 10 Notice of Appeal filed by Douglas N Pearson. (myz) (Entered: 10/26/2004)
10/28/2004		Record on Appeal Prepared re 10 Notice of Appeal (myz) (Entered: 10/28/2004)

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104

UNITED STATES,

Petitioner

—v.—

FREDDIE J. BOOKER; and

No. 04-105

UNITED STATES,

Petitioner

—v.—

DUNCAN FANFAN

Washington, D.C.

Monday, October 4, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

T. CHRISTOPHER KELLY, ESQ., Madison, Wis.; on behalf of the Respondent Booker.

* * *

[31] have authorized.

MR. CLEMENT: Well, again, I can only give you the numbers—

JUSTICE STEVENS: It's potentially that every case does. But if in fact, most sentences come within the maximum anyway, it's of course a serious problem in those cases, but system-wide, it's not nearly the problem that the figures you've mentioned suggest.

MR. CLEMENT: Again, Justice Stevens, I want to answer as best I can. The figures I have suggest that 65 percent of the cases do involve an upward adjustment of some kind. And so there is a Blakely problem. So the only real question is, all right, 65 percent of cases in the world where nobody thought Blakely was a problem for the guidelines involve those kind of upward adjustments. There may be ways through plea agreements and the like to have people waive their Blakely rights in certain ways that may make the system work a little bit better or deal with a slightly reduced number of cases. But I think any way you slice this, this is going to have a tremendous impact on the reality of criminal sentencing in the Federal system.

[32] JUSTICE SCALIA: Well, as to past. I mean, it may have a significant one-shot impact with respect to cases

that were decided without Blakely in mind. But for the future, I, I just don't agree with you that changes could make some reduction. I think changes could provide for jury findings whenever, whenever there's a need for a higher sentence based on facts. I don't know; what is the problem with that?

MR. CLEMENT: Well, I, well let me try to address the remedial question then going forward. If this Court were to find that Blakely is fully applicable to the guidelines, then that's going to raise some very serious and complex remedial questions. One question, though, I think ought to be clear, is that one option that shouldn't be on the table is the idea that on a prospective basis, the guidelines are severable in a way that makes all enhancements or all upward adjustments completely unavailable, and all downward departures fully available. Because that system is obviously nothing that Congress intended.

Now Respondents, for their part, don't propose that rule, although they want to benefit from effectively that rule for their own cases.

* * *

[100] statute.

JUSTICE STEVENS: And may I add this thought, that it seems to me, I don't know whether this is true; Mr. Clement and I had a dialogue that was inconclusive; I had been under the impression, perhaps erroneous, that in fact the number of unconstitutional departures if one follows Apprendi as being the constitutional rule, is actually a small percentage of the total, and if it should follow that only three, four, five, six percent of the sentences that have heretofore been imposed or will be imposed in the future would be unconstitutional, that's a pretty weak reason for saying the whole statute is

unconstitutional on its face, or even in one provision of the statute. It seems to me you just say, "Oh, okay, you can't impose those sentences in those three percent of the cases." I don't know why that's a departure from our prior practice.

MS. SCAPICCHIO: I, Well, I think because what's left is, is that the system will then be open to some manipulation, under that scenario. If the Government can control who it is that will be sentenced under the guidelines and who will not

* * *

(2)

No. 04-1337

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DOUGLAS N. PEARSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

HAROLD J. RUVOLDT, JR.
Counsel of Record
EDWARDS & ANGELL, LLP
750 Lexington Avenue
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(212) 308-4411

Attorneys for Petitioner
Douglas N. Pearson

Petitioner Douglas N. Pearson herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 16, 2005, and (2) granting the petition. As grounds for this motion, petitioner states as follows:

> AS PEARSON'S CO-DEFENDANT AT TRIAL, AND DURING HIS APPEAL, HAS JUST HAD HIS SENTENCE REMANDED BY THIS COURT IN LIGHT OF *UNITED STATES V. BOOKER*, 125 S.CT. 738 (2005), AND, IN TURN, BY THE SEVENTH CIRCUIT COURT OF APPEALS, IT WOULD BE A MANIFEST INJUSTICE NOT TO REMAND PEARSON'S SENTENCE

As set forth in Pearson's petition for writ of certiorari, on June 20, 2002, following a four-month jury trial, petitioner was convicted of Conspiracy to Commit Wire Fraud under 18 U.S.C. § 371 (Count I) and Wire Fraud under 18 U.S.C. § 1343 (Count II). Pearson was tried with co-defendant Arthur M. Hawkins, both in their capacity as Exide Corporation officers, who was also found guilty of both counts. At a hearing held on December 20, 2002, Pearson was sentenced by the trial court to a prison term of 64 months, a two-year term of supervised release and a fine in the amount of $150,000. One day earlier, Hawkins was sentenced to 120 months' imprisonment, a three-year term of supervised release and a fine of $1 million.

On December 19, 2002, over objection, the trial court ordered Hawkins immediately remanded to the custody of the United States Marshal to begin serving his sentence. Pursuant to the trial court's order, on January 2, 2003, Pearson surrendered to the United States Marshal of the Southern District of Illinois to begin his sentence. Both men remain incarcerated at different federal correctional facilities.

On August 14, 2003, the Court of Appeals for the Seventh Circuit denied Pearson's and Hawkins' joint appeal. A copy of this decision, contained in petitioner's original Appendix, is reproduced hereto in the Appendix ("App.") at 4a-22a.

Both Pearson and Hawkins subsequently made separate applications to the trial court, the Seventh Circuit Court of Appeals and ultimately this Court to vacate their respective sentences and remand the matters for resentencing in view of the Court's holding in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and *United States v. Booker/Fanfan*, 125 S.Ct. 738 (2005).

Subsequent to Pearson filing his petition for writ of certiorari on or about April 6, 2005, the Seventh Circuit issued an Order on May 9, 2005 in the matter of *United States v. Hawkins*, 01 CR 30006-DRH, reprinted at App. 2a-3a, wherein the Circuit Court held that "[t]his case com[ing] to us on remand from the Supreme Court for further consideration in light of *United States v. Booker*, 125 S.Ct. 738 (2005) . . . we order a limited REMAND of Arthur M. Hawkins's sentence in accordance with *Booker* and [*United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005)]." By Order dated May 13, 2005, reprinted at App. 1a, the trial court set forth a briefing schedule and offered the parties the opportunity to be heard at oral argument.

In Pearson's original petition, he highlighted for this Court the stark disparity—and inconsistency—in sentencing protocols as applied to his circumstances versus at least one other person convicted in the Seventh Circuit in an unrelated action, *see United States v. Shearer*, 379 F.3d 453, 454 (7th Cir. 2004), ***on the very same day*** as his June 20, 2002 conviction. Now Pearson is confronted with the unjust result of his co-defendant, Arthur M. Hawkins —the man with whom he sat on trial with for nearly four

months, who was sentenced and began serving that sentence just prior to him, and with whom he was coupled during their joint appeal—being permitted to submit argument to the trial court for resentencing in accordance with *Booker*, while he is denied the same right. Clearly, based on legal principles and for considerations espoused at far greater length in Pearson's original petition, the Court did intend for such a manifest inequity. For purposes of resentencing procedure, Pearson should stand in the same shoes and be given the same opportunities as his co-defendant Hawkins.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner Pearson prays that that this Court grant rehearing of the order of denial, vacate that order, grant the petition and reverse the Seventh Circuit's decision below.

Respectfully submitted,

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Counsel of Record and Attorneys for Petitioner Douglas N. Pearson

Dated: June 6, 2005

CERTIFICATE OF COUNSEL

I, Harold J. Ruvoldt, Jr., certify as follows:

1. I prepared this Petition for Rehearing of the Petition for Writ of Certiorari.
2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial; or controlling effect or to other substantial grounds not previously presented.
3. This Petition is presented in good faith and not for the purpose of delay.

Dated: June 6, 2005

Respectfully submitted,

/s/ HAROLD J. RUVOLDT, JR.

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Counsel of Record and Attorneys for Petitioner Douglas N. Pearson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 01-CR-30006-DRH

UNITED STATES OF AMERICA,

Plaintiff,

—VS.—

ARTHUR M. HAWKINS,

Defendant.

ORDER

HERNDON, District Judge:

This matter comes before the Court on a limited remand of Hawkins's sentence from the Seventh Circuit Court of Appeals pursuant to *United States v. Booker*, 125 S.Ct. 738 (2005) and *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). Per *Paladino*, the Court ORDERS the parties to brief this issue by Friday, June 3, 2005. Further, the briefs shall indicate whether the parties wish to have oral argument on this matter and, if so, the reasons for requesting same.

IT IS SO ORDERED.

Signed this 13th day of May, 2005.

/s/ David RHerndon
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 9, 2005

Before

HON. ILANA DIAMOND ROVNER, *Circuit Judge*
HON. DIANE P. WOOD, *Circuit Judge*
HON. ANN CLAIRE WILLIAMS, *Circuit Judge*

NOS. 03-1005, 03-1232

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ARTHUR M. HAWKINS,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Illinois

No. 01 CR 30006

David R. Herndon, *Judge*.

ORDER

This case comes to us on remand from the Supreme Court for further consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005). Each party has filed a statement of position pursuant to Circuit Rule 54. In their respective Rule 54 statements, both parties agree that this case should be remanded to the district court under *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

After review of the Rule 54 statements, while retaining jurisdiction, we order a limited REMAND of Arthur M. Hawkins's sentence in accordance with *Booker* and *Paladino*.

A True Copy:
Teste:

JAMES RICHMOND, DEPUTY
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 02-4356, 03-1005, 03-1232

UNITED STATES OF AMERICA,

Petitioner-Appellee,

—v.—

DOUGLAS N. PEARSON and ARTHUR M. HAWKINS,

Defendants-Appellants.

Argued May 27, 2003
Decided Aug. 14, 2003
Rehearing and Rehearing En Banc
Denied Oct. 14, 2003*

Miriam F. Miquelon (argued), Office of the United States Attorney Criminal Division, Fairview Heights, IL, for Plaintiff-Appellee.

Harold J. Ruvoldt (argued), Edwards & Angell, New York, NY, for Defendant-Appellant, Douglas N. Pearson.

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* Chief Judge Joel M. Flaum and Judge Kenneth F. Ripple took no part in the consideration of this case.

Oscar Stilley (argued), Fort Smith, AR, for Defendant-Appellant, Arthur M. Hawkins.

Before Rovner, Diane P. Wood, and Williams, Circuit Judges.

WILLIAMS, Circuit Judge.

Arthur Hawkins and Douglas Pearson were convicted of wire fraud and conspiracy to commit wire fraud based on their participation in a bribery scheme that facilitated the distribution of their company's defective batteries. Hawkins and Pearson appeal their convictions, arguing, among other things, that they should not have been tried on a superceding indictment that was filed outside the relevant statute of limitations, their case should not have been tried in the Southern District of Illinois, they were prejudiced by certain discovery rulings of the district court, and the district court improperly limited their ability to examine a key witness at trial. We reject all of their arguments and affirm the judgment of the district court in all respects.

I. BACKGROUND

Arthur Hawkins and Douglas Pearson were officers of Exide Corporation, a battery manufacturer. Hawkins was the CEO and Chair of the Board of Directors, while Pearson served as Executive Vice President of Sales and Marketing and later as President of North American Operations. In 1993, Exide bid on a contract to manufacture DieHard batteries for Sears. Exide's bid con-

tained a promise of "space age technology," and it stated that Exide's DieHard batteries would contain silvium II (silver additive), high utilization paste, and one-inch breed lugs. In April 1994, Exide was awarded the DieHard contract.

Despite Exide's promises, the batteries it manufactured contained only trace amounts of silver, the high utilization paste did not add any value to the battery, and the one-inch lug created a design flaw. As early as October 1994, soon after the batteries were rolled out in Sears stores, Exide officials were warned of significant quality problems with the batteries. As a result, Sears indicated to Exide that it was in jeopardy of losing the DieHard business. By the end of October, Exide went into approximately 700 stores nationwide to remove defective batteries from the shelves.

In order to keep the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. Beginning in March 1995 and continuing through February 1996, Exide made several payments of approximately $10,000 each to Marks. At first, Joseph Calio, Senior Vice President of Sales and Marketing for Exide, gave the bribes to Marks. After Calio complained about making the payments, Exide sent the bribes to Marks's phony consulting company, DG Consulting, by check or wire. Marks left Sears in July 1997.

In April 1998, Hawkins informed Marks that Calio had implicated Marks in an investigation by the Florida Attorney General's Office into the Exide bribery scheme. In order to cover up their arrangement, Hawkins and Marks concocted a phony consulting agreement between Exide and DG Consulting and created supporting backdated documents to substantiate the bribe payments. Hawkins paid Marks $15,000 in spring of 1999 and an additional $10,000 later that fall for

Marks's participation in the cover-up scheme and for his execution of the false cover-up documents.

In January 2001, Hawkins and Pearson were charged in a two-count indictment with wire fraud and conspiracy to commit wire fraud. The indictment, which was filed under seal, charged that the batteries failed testing standards and that Exide falsified internal quality assurance reports to hide latent manufacturing defects. It also charged that Exide supplied the defective batteries to Sears distribution centers, causing defective batteries to be distributed nationwide to consumers, and defendants failed to recall batteries that were known to be defective. In addition, there were allegations that Exide falsely advertised that the batteries were manufactured with certain "proprietary features" when the batteries either did not contain the features or they added nothing to the durability or quality of the batteries. Finally, according to the indictment, after the defective batteries were in the stores, defendants made unlawful payments to Marks in an attempt to influence his independent judgment and to promote the business arrangement with Sears, and then concealed the unlawful payments by causing corporate financial records to be falsified.[1]

After the original indictment was returned against Hawkins and Pearson in January 2001, two superceding indictments were filed in open court in March 2001, then in July 2001. Hawkins and Pearson were tried on the second superceding indictment beginning on March 18, 2002. Following approximately three months of trial, a

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[1] In March 2001, Marks and Calio pled guilty to wire fraud and signed plea agreements with the government. In December 2001, Sears Automotive Marketing Services, Inc., a subsidiary of Sears, entered into a pretrial diversion agreement in which the U.S. Attorney's Office agreed not to prosecute it in exchange for a payment of $62.6 million.

jury convicted Hawkins and Pearson on both counts. Hawkins was sentenced to 120 months' imprisonment, a three-year term of supervised release, and a fine of $1 million, while Pearson received a sentence of 64 months' imprisonment, a two-year term of supervised release, and a fine of $150,000. Defendants appeal.

II. ANALYSIS

Hawkins and Pearson have taken a kitchen-sink approach to their appeal, filing separate briefs (with voluminous appendices) and together raising over a dozen distinct issues, each with their own sub-contentions. Neither challenges the sufficiency of the evidence to support their conviction. In the face of the avalanche of issues they have raised, we will focus here on defendants' most substantive contentions.

A. Superceding Indictment

Defendants first argue they were tried under a second superceding indictment that, because it was returned outside the statute of limitations period and did not relate back to the original indictment, was time-barred. We review the district court's ruling regarding the statute of limitations de novo. *United States v. Anderson,* 188 F.3d 886, 888 (7th Cir.1999). The original indictment against defendants, which included a wire-fraud count for the wiring of money on January 31, 1996, was filed January 19, 2001, within the five-year statute of limitations. *See* 18 U.S.C. § 3282. Subsequently, a first superceding indictment was returned on March 22, 2001, and a second superceding indictment was returned July 19, 2001. Although only the original indictment was filed within the five-year limit, "a superceding indictment that supplants a still-pending original indictment relates back to

the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross,* 77 F.3d 1525, 1537 (7th Cir.1996). Defendants have two statute of limitations complaints about the indictments: the original indictment was filed under seal and the later indictments do not relate back to the original indictment.

We first address defendants' concern that the original indictment was sealed. Defendants argue that despite the fact that filing an indictment within the statute of limitations period tolls the running of the statute of limitations, it should not have been tolled in this case because the original indictment was filed under seal. Federal Rule of Criminal Procedure 6(e)(4) provides that a court "may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial." Rule 6 does not require the statute of limitations analysis to be altered when an indictment is sealed, and we see no reason why, in a case such as this where an open indictment was filed only two months later, the statute of limitations should continue to run after a sealed indictment has been returned. *See United States v. Thompson,* 287 F.3d 1244, 1251 (10th Cir.2002); *United States v. Edwards,* 777 F.2d 644, 647 (11th Cir.1985); *United States v. Watson,* 599 F.2d 1149, 1154 (2d Cir.1979).

Hawkins also complains that because the original indictment has remained under seal, his counsel has never been able to determine whether the first superceding indictment relates back to the original indictment. The district court conducted an *in camera* comparison of the original indictment to the first superceding indictment and determined that the only difference between the two was the removal in the latter of the identity of an

unindicted coconspirator. Our review confirms this minor change, which, since it does not alter or amend the charges against the defendants in any way, does not offend the statute of limitations.

This is not to say, however, that it was proper for the indictment to indefinitely remain under seal in the district court. Pearson and the government acknowledge that the identity of the coconspirator named in the original indictment has been publicly revealed. This court has repeatedly recognized the paramount importance of providing public access to court proceedings, especially in criminal matters. *See, e.g., In re Associated Press v. Ladd,* 162 F.3d 503, 509-10 (7th Cir.1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir.1994). At the very least, once the identity of the unindicted coconspirator became known, the indictment should have been unsealed, and it is, as of this date, unsealed.[2]

Defendants' second statute of limitations argument is that changes made to the conspiracy count in the second superceding indictment materially broadened the charge, preventing it from "relating back" to the original indictment, and leaving it time-barred. The second superceding indictment modified the end date of the conspiracy from February 1996 to September 2000 and added three overt acts which occurred during that time. Defendants argue that the three acts—Hawkins's preparation of

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[2] We remind litigants that under Seventh Circuit Operating Procedure 10, "[e]xcept to the extent portions of the record are required to be sealed by statute . . . every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by . . . this procedure."

Marks's false affidavit, his preparation of a phony consulting agreement, and his false testimony about the consulting agreement—were not part of the wire fraud conspiracy and thus expanded the alleged crime. However, "the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy." *United States v. Hickey,* 360 F.2d 127, 141 (7th Cir.1966). Here, the uninterrupted success of the conspiracy turned on defendants' ability to continuously conceal the truth about the defective batteries from consumers and Exide shareholders. Hawkins's acts to prop up the scheme were an integral part of the continuing actions of deceit. We find that defendants were on notice of the charges pending against them because "the initial indictment informed appellant[s] in no uncertain terms that [they] would have to account for essentially the same conduct with which [they were] ultimately charged in the superceding indictment," *United States v. O'Bryant,* 998 F.2d 21, 24 (1st Cir.1993), and therefore the second superceding indictment did not violate the statute of limitations.

B. Venue

We next examine Pearson and Hawkins's arguments that venue was not proper in the Southern District of Illinois. We review claims of improper venue to determine "whether the government proved by a preponderance of the evidence that the crimes occurred in the district charged, viewing the evidence in the light most favorable to the government." *United States v. Ochoa,* 229 F.3d 631, 636 (7th Cir.2000). Article III of the Constitution stipulates that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," § 2, cl. 3, and the Sixth Amendment similarly requires that "[i]n all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." These Constitutional conditions also are echoed in Federal Rule of Criminal Procedure 18, which dictates that a criminal prosecution must occur "in a district in which the offense was committed." Because the wire fraud statute does not contain a specific statutory venue provision, the general venue provision for offenses that occur in more than one state or district, 18 U.S.C. § 3237(a), applies here: "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

Defendants contend that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois. In cases interpreting the application of § 3237(a), this court has held that "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime.' " *United States v. Ringer,* 300 F.3d 788, 792 (7th Cir.2002) (quoting *Ochoa,* 229 F.3d at 636).

In *Ringer,* the defendant was charged with making false statements to federal officers in the Eastern District of Kentucky and was tried in the Southern District of Indiana. *Id.* at 790. We held that venue was proper in the Southern District of Indiana because, although the statements occurred elsewhere, they were intended to influence a trial set to occur in the Southern District of Indiana, and the materiality of the statements was an

element of the crime. *Id.* at 792. Similarly, in *United States v. Frederick,* 835 F.2d 1211, 1212 (7th Cir.1987), venue was proper in the Northern District of Illinois when a defendant was charged with witness tampering that occurred in the Southern District of Florida but was intended to affect a trial in the Northern District of Illinois. We explained that "[p]roper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 1215.

In the instant case, defendants intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.

These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. *See United States v. O'Brien,* 119 F.3d 523, 532 (7th Cir.1997); *see also* 18 U.S.C. § 1343. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United States v. Rodriguez-Moreno,* 526 U.S. 275, 280, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (upholding venue in prosecution of firearm offense where crime of violence, an essential element of the firearm offense, occurred in the trial district), and Pearson and Hawkins's crime of

wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.[3]

Hawkins also complains that venue was improper as to the conspiracy count. Both the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud. "As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there." *United States v. Molt*, 772 F.2d 366, 369 (7th Cir.1985). Venue for both the conspiracy and substantive wire fraud counts was proper in the Southern District of Illinois.

C. Discovery and Pretrial Rulings

Defendants also raise several objections to pretrial rulings by the district court, and we review their complaints keeping in mind that "[d]istrict courts have broad discretion in discovery matters." *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 646 (7th Cir.2001). We review discovery challenges for abuse of discretion, and "[w]e shall not reverse the district court's ruling absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to [defendants]." *Id.* at 646; *see also United States v. Avery*, 208 F.3d 597, 601 (7th Cir.2000). We note at the outset that the government maintained an open-file policy in this case, by which defendants, through their copy vendor, could copy all of

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[3] Although neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir.2002), the Ninth Circuit held that venue for a wire fraud offense may only "lie where there is a direct or causal connection to the . . . wires." This approach differs with the rubric we have established for analyzing venue in *Frederick*, *Ochoa*, and *Ringer*, and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*.

the government's records, and the district court observed that defendants had "extraordinary access" to documents in this case. Furthermore, defendants have failed to show actual prejudice from any of the issues they have raised with the discovery process. Despite this fatal flaw, we will briefly discuss their contentions for the sake of completeness.

We first review the district court's rejection of defendants' motion for a continuance. In late January 2002, Pearson moved for a trial continuance, the third such request made by defendants. Defendants argue that they needed more time to prepare for trial because 86 boxes of discovery material had not yet been copied by defendants' copy vendor, and because of the large volume of documents. Importantly, defendants do not argue that the government did not make the 86 boxes of documents available to them, only that the log maintained by the U.S. Postal Inspector's Office to account for the government boxes being taken for copying by defendants' copy vendor indicated that 86 boxes had not yet been copied.[4] After providing defendants free and open access to the documents through its open-file policy, the government was under no obligation to ensure that defendants took advantage of the open files by actually copying or reviewing each box. Further, although there was a large amount of discovery to review in preparation for trial, defendants had one year from the date of the first superceding indictment and seven and one-half months from the date of the second superceding indictment to prepare for trial. We do not find any abuse of discretion in the district court's denial of defendants'

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[4] Defendants also complain about an additional 23 boxes that the log indicates were received by defendants' copy vendor, but of which defendants did not receive copies. This seems to be a problem more properly addressed to the copy vendor, not to the court.

motion for a continuance, as defendants had adequate time and access to discovery in order to prepare for trial.

Second, we consider defendants' argument that the district court should have required the government to provide defendants with a list of potential witnesses and a list of its trial exhibits. Despite the fact that Federal Rule of Criminal Procedure 16 addresses many of the defendants' concerns, their briefs are noticeably silent as to the Rule's provisions. Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents . . . or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

As we have noted before, the law is clear that neither the Constitution nor Rule 16 entitles a defendant to a list of all prospective witnesses before trial in a noncapital case. *See United States v. Napue,* 834 F.2d 1311, 1317 (7th Cir.1987).[5] The district court may require the government to provide a witness list, *see United States v. Edwards,* 47 F.3d 841, 843 (7th Cir.1995); *United States v. Jackson,* 508 F.2d 1001, 1006 (7th Cir.1975), but, as

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[5] We note that defendants do not argue that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500(b), which requires the government, upon defendants' motion, to produce statements made by any of its witnesses which the particular witnesses signed, adopted, or approved, and which pertain to their testimony at trial. Instead, defendants' argument focuses on the provision of a list of witnesses before they took the stand.

Congress recognized when it declined to include such a requirement in Rule 16, a district court may also choose not to exercise that prerogative, since providing a witness list might in some cases discourage witnesses from testifying or lead to " 'improper contact directed at influencing their testimony.' " *Napue*, 834 F.2d at 1317 (quoting H.R. CONF. REP. NO. 94-414 (1975), *reprinted in* U.S.S.C.A.N. 674, 713, 716). With respect to the provision of an exhibit list, defendants admit that they received copies of the exhibits themselves, and they limit their complaint to the lack of a list of the exhibits to aid in their organization for trial. As noted earlier, Rule 16 requires the government to make certain physical objects and documents available for inspection and copying, but it is silent as to any responsibility by the government to provide an organizational guide to those materials for defendants. Although provision of an exhibit list likely would have made this trial more efficient for all involved, and we certainly encourage parties to exchange them pretrial, we cannot find the district court abused its discretion for failing to order the government to furnish lists that Rule 16 does not require it to provide.[6]

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[6] Because the government did provide the district court with a courtesy copy of an exhibit list, defendants also argue that the government's failure to provide them with the same list constituted *ex parte* communication in violation of *United States v. Culp*, 7 F.3d 613 (7th Cir.1993). *Culp* rightly noted that the government has a professional obligation under ABA Model Rule of Professional Conduct 3.5(b) to provide a copy to defense counsel of "any papers, documents or exhibits he files with the court in order to avoid an *ex parte* contact with the judge." *Id.* at 616 n. 1. Despite the fact that defendants' *ex parte* argument misses the mark—no information was hidden from them since they had copies of the exhibits themselves—we emphasize that simply providing a copy of the exhibit list to the defendants would have avoided this unnecessary dispute.

Next, defendants argue that the district court erred in rejecting their motion to compel the production of approximately 3800 allegedly-defective batteries that the government obtained from Sears. Defendants allege that, despite the fact that the batteries were never introduced at trial, the government's refusal to turn over the batteries compromised their ability to defend against the accusation that the batteries were defective because they could not have the batteries tested to determine their quality. The batteries were never analyzed by any party, and the government contends that they could not have been tested because their condition had deteriorated to a point that made reliable testing impossible. Defendants disagree and argue that testing would have been merely difficult, not impossible. Rule 16 requires the government to provide access to objects "which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." In *United States v. Armstrong*, 517 U.S. 456, 462, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Court held that "material to the preparation of the defendant's defense" means "the defendant's response to the Government's case in chief," and does not include materials deemed by defendants to be necessary to prove their own defense theory or to challenge the prosecutor's conduct of the case. Defendants argue that even though the 3800 batteries were not part of the government's case, test results could have been used to respond generally to the government's allegations that the batteries were defective. But even if we assume that the batteries could have been tested and we assume that defendants could have used test results to defend against the government's case in chief under *Armstrong*, it is difficult to imagine how defendants could have suffered actual prejudice from the lack of access to the batteries. When Exide pled guilty,

it stipulated that the batteries were manufactured and distributed with latent defects. On the other hand, we fail to see what harm could have come from the government turning over the batteries. But given the uncertainty about the condition of the batteries and Exide's stipulation that the batteries were in fact defective, we do not think the district court's denial of defendants' motion to compel the batteries rises to an abuse of discretion.[7]

Finally, defendants allege that the government improperly failed to turn over several documents in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a *Brady* violation, defendants must show "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *United States v. Silva*, 71 F.3d 667, 670 (7th Cir.1995). Defendants offer three "examples" of *Brady* violations, but in each case fail to articulate why the evidence sought was not available to defendants through the exercise of due diligence. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir.2002). They first point to the government's refusal to turn over the grand jury testimony of Tim Findlay, who, according to Pearson, coordinated an Exide management buy-out plan to purchase Kmart's auto centers. Putting aside their failure to explain the relevance of Findlay's grand jury testimony to the case at bar, the district court found, and defendants do not dispute, that Findlay was available to be called as a witness for the defense. Defendants' other

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[7] Defendants also object to the district court's refusal to compel production of a CD-Rom holding battery data. The CD-Rom contained an inventory of manufacturing codes and internal serial numbers that were placed on the batteries. We do not see how this information is relevant to defendants' case, and we find no error in the district court's decision to deny defendants' motion to compel.

Brady allegations are equally unconvincing. They posit that the government should have turned over the debriefing notes of a co-defendant who pled guilty and agreed to cooperate with the government, and that it should have provided the grand jury testimony of defendant Hawkins's son, Lee Hawkins. These strike us as witnesses who would be easily available to defendants, and defendants have not explained to the contrary. Under these circumstances, we find no error under *Brady* in the district court's refusal to order the government to turn over these materials.

D. Impeachment Evidence

Defendants further contend that the district court erred when it did not allow defendants to introduce certain documents in their cross-examination of Joseph Calio. Evidentiary rulings by the district court are reviewed by this court for abuse of discretion. *United States v. Nedza,* 880 F.2d 896, 903 (7th Cir.1989). Calio generally testified that he was obtaining money for bribes through wire transfers from Exide and covering it up by signing backdated documents that provided false reasons for the wires. He was also a key witness against Pearson, and he described Pearson's active role in the conspiracy. At trial, defendants attempted to introduce documents that they claim would have provided a legitimate explanation for the wire transfers that Calio testified were fictitious. These documents included airline tickets for European travel in 1995, a passport showing that Calio landed in London in 1995, and an American Express statement including a charge for plane tickets, which defendants apparently sought to support a theory that Calio used the money wired to him by Exide to purchase a personal vacation to Europe rather than to bribe Marks. The government argued that there was no connection between

the documents and the bribe money wired to Calio. The district court agreed, finding the documents would be very misleading to the jury, and relied on Federal Rules of Evidence 403 and 608(b) to exclude them. Given the district court's factual finding that the documents were unrelated to the fraudulent transfer, we find no abuse of discretion in the district court's exclusion of the potentially misleading documents. *See United States v. Thomas,* 321 F.3d 627, 630 (7th Cir.2003) ("The balancing of probative value and prejudice is a highly discretionary assessment, and we accord the district court's discretion great deference, only disturbing it if no reasonable person could agree with the ruling."); *Chase v. Consol. Foods Corp.*, 744 F.2d 566, 571 (7th Cir.1984) ("Since the trial judge has the feel of the jury in a way that the appellate court cannot, his ruling [excluding potentially misleading evidence] will rarely be disturbed on appeal.").

Defendants also contend that the court erred in ending the defense's examination of Calio. The court excused Calio from the witness stand after a hearing in chambers in which the government argued that Pearson's attorney suggested to Calio's counsel that Calio may have breached his plea agreement with the government, that he should assert his Fifth Amendment privilege against self-incrimination, and the defense would then move to strike all of Calio's testimony. At the time the district court ended Calio's testimony, Calio had testified as a government witness for three days, including substantial cross-examination by defendants, and had then been recalled by defendants as a witness for the defense. Defendants claim that, as a result of the court's ruling, they did not have the opportunity to examine Calio as to certain conversations he had with government witness Rick Randalls, although defendants do not explain the

significance of this evidence or why it had not been discussed with the witness earlier.

During the three and one-half days Calio had been on the stand, the defense had ample opportunities to impeach Calio on many different issues. "Merely cumulative evidence is excludable, as having little probative value, Fed.R.Evid. 403; merely cumulative impeachment evidence likewise." *United States v. Boyd*, 55 F.3d 239, 246 (7th Cir.1995). Defendants thoroughly questioned Calio on issues including discrepancies in his accounts of alleged meetings with the defendants, misstatements in a deposition with the Florida Attorney General, tax evasion, his possible bias against Pearson including statements that he "hated Pearson" and had commented on Pearson's sexual orientation, and the fact that he received a deal from the government for his testimony. They do not explain why additional testimony from Calio would have been anything but cumulative. "Determining whether testimony is cumulative rests within the sound discretion of the district court," *United States v. Gardner*, 211 F.3d 1049, 1055 (7th Cir.2000), and we find no abuse of discretion by the district court in ending Calio's testimony.

Hawkins and Pearson raised a number of other issues in their appeals, and although we have considered each of these arguments, we conclude that they are without merit and are of insufficient importance to discuss here.

III. CONCLUSION

Accordingly, we AFFIRM the convictions and sentences of the defendants.